TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1951

No. 44

JOHN KEDROFF AND BENJAMIN FEDCHENKOFF, AS ARCHBISHOP, ETC., APPELLANTS,

vs.

SAINT NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH IN NORTH AMERICA

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

FILED MAY 3, 1951.

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SUPREME COURT OF THE UNITED STATES

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INDEX

	Original	Print
Record on appeal to Court of Appeals of New York	1	1
Statement under Rule 234 (omitted in printing)	1	
Notice of appeal to Appellate Division (omitted in printing)	2	
Record from Supreme Court of New York, County of New York	3	1
Summons (omitted in printing)	3	
Amended complaint	4	1
Answer of defendant Kedroff	6	2
Amended answer of defendant Fedchenkoff	7	2
Note re judgment appealed from	10	4
Transcript of evidence	13	5
Appearances	13	5
Testimony of Archbishop Leonty Turkevich	17	6
George P. Fedotov	77	40
Archbishop Leonty Turkevich (resumed)	115	59
Colloquy between court and counsel	130	69
Testimony of George P. Fedotov (recalled)	163	80
Benjamin Fedchenkoff	203	112
George P. Fedotov (resumed)	240	139
Joseph Pishtey	265	158

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—6593

	Original	Print
Record from Supreme Court of New York, County of New York—Continued		
Transcript of evidence—Continued		
Colloquy between court and counsel	267	160
Testimony of Gregory Tchukov	271	162
Plaintiff's Exhibit 1—Act incorporating St. Nicholas Cathedral	281	169
Plaintiff's Exhibit 3—Minutes of first meeting of Cathedral trustees	284	171
Plaintiff's Exhibit 4—Judgment on appeal in Kedrovsky v. Rojdesvensky	294	175
Note re Plaintiff's Exhibit 5	296	176
Plaintiff's Exhibit 5-A—Ukase of November 20, 1920	297	177
Plaintiff's Exhibit 6—Extract from minutes of Sobor held at Detroit, April 2-4, 1924	301	180
Note re Plaintiff's Exhibit 6-A	313	189
Plaintiff's Exhibit 7—Proposed order in Kedrovsky v. Rojdesvensky	314	189
Plaintiff's Exhibit 7-A—Memorandum on settlement of order	318	192
Plaintiff's Exhibit 7-C—Affidavit of Ralph Montgomery Arkush	320	193
Plaintiff's Exhibit 8—Docket entries in Kedrovsky v. St. Nicholas Cathedral	335	204
Plaintiff's Exhibit 11—Deed from St. Nicholas Church to St. Nicholas Cathedral	338	204
Notes re Exhibits 13, 14, and 15	343	206
Plaintiff's Exhibit 15-A—Declaration by Metropolitan Sergius	343	207
Plaintiff's Exhibit 15-B—Statement of Stalin	345	208
Plaintiff's Exhibit 16—Letter of Metropolitan Council in regard to ukase of February 16, 1945	346	209
Plaintiff's Exhibit 17—Cablegram, January 21, 1947, from Metropolitan Theophilus to Patriarch Alexy	361	219
Plaintiff's Exhibit 17-A—Cablegram received January 18, 1947, by Metropolitan Theophilus from Patriarch Alexy	362	220
Plaintiff's Exhibit 17-B—Cablegram January 31, 1947 from Metropolitan Theophilus to the Patriarch at Moscow	363	221
Note re Plaintiff's Exhibit 18, 18-A, and 19	363	221
Defendant's Exhibit A—Resolution of Sobor at Cleveland in 1946	364	221
Note re Defendant's Exhibit B	366	223
Defendant's Exhibit C—Ukase of the Moscow Patriarchate	366	223
Defendant's Exhibit D—Ukase of February 16, 1945	372	227

	Original	Print
Record from Supreme Court of New York, County of New York—Continued		
Transcript of evidence—Continued		
Defendant's Exhibit F—Papers in regard to transfer of property of Russian Orthodox St. Nicholas Church in New York	375	229
Defendant's Exhibit G—Letterhead of Metropolitan Benjamin	400	236
Defendant's Exhibit H—Article from "The Living Church"	400	237
Defendant's Exhibit I—Memorandum on the status of the Russian Orthodox Church in America	407	242
Defendant's Exhibit J—Extract from memorandum of defendant's attorney	415	248
Opinion, Botein, J. (omitted in printing)	417	
NOTE: This opinion printed as Exhibit D to Jurisdictional Statement, pp. 126-132.		
Stipulation as to certain exhibits deemed marked for identification	426	250
Stipulation waiving printing of certain exhibits	428	251
Stipulation and order settling and filing case (omitted in printing)	429	
Notice of appeal to Court of Appeals (omitted in printing)	431	
Order of affirmance, Appellate Division (omitted in printing)	433	
Judgment of Appellate Division (omitted in printing)	435	
Opinions of the Appellate Division (omitted in printing)	436	
NOTE: These opinions printed as Exhibit C to Jurisdictional Statement, pp. 86-126.		
Stipulation waiving certification (omitted in printing)	490	
Clerk's certificate (omitted in printing)	491	
roceedings in Court of Appeals of New York	492	252
pinion, Conway, J.	492	253
oncurring opinion, Froessel, J.	524	284
ssenting opinion, Desmond, J.	526	286
emittitur	539	297
der denying motion for reargument and amending remittitur	542	298
der of Supreme Court making judgment of Court of Appeals judgment of that court (omitted in printing)	543	
dgment of Supreme Court on remittitur (omitted in printing)	545	
der allowing appeal	549	299
ition for appeal and assignment of errors	506	
ecipe for record (omitted in printing)	558	
nd on appeal (omitted in printing)	560	

	Original	Print
Counter praecipe for record (omitted in printing)	562	
Statement of points to be relied upon	572	304
Designation of parts of record to be printed (omitted in printing)	572	
Stipulation for omission of additional portions of record (omitted in printing)	576	
Order noting probable jurisdiction	580	304

[fols. 1-3]

SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK

SAINT NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH IN NORTH AMERICA,

Plaintiff,

against

JOHN KEDROFF,

Defendant.

[fol. 4] AMENDED COMPLAINT

The plaintiff, complaining of the defendant, by Ralph Montgomery Arkush, its attorney, alleges:

First.—The plaintiff at all of the times hereinafter mentioned was and still is a domestic corporation.

Second.—The plaintiff at all of the times hereinafter mentioned was and still is seized in fee and lawfully entitled to the possession of the premises known as Nos. 13-15 East 97th Street, Borough of Manhattan, City and State of New York, being more particularly bounded and described as follows, to wit:

(Description of the premises omitted in printing.)

[fol. 5] Third.—On or about May 15, 1944, the defendant without any color of authority or right, wrongfully entered upon said premises and has continued and now is in possession of said premises and wrongfully withholds possession of said premises from the plaintiff, and refuses to deliver possession of said premises to the plaintiff, although due demand therefor has been made on the defendant.

Wherefore the plaintiff demands judgment that it be adjudged the owner in fee of the real property hereinbefore described, and that possession of said premises be restored to the plaintiff and that the defendant, his agents, employees, attorneys and any and all persons claiming title or possession or any right of possession under, by or through the defendant, be removed and excluded from the possession of the premises, and that the plaintiff have such other and further relief as may seem just and proper.

and recover of the defendant the costs and disbursements of this action.

Ralph Montgomery Arkush, Attorney for Plaintiff, Office and Post Office Address, No. 15 Broad Street, Borough of Manhattan 5, New York.

(Verified by R. M. Arkush on April 26, 1945.)

[fol. 6] IN SUPREME COURT OF NEW YORK

ANSWER OF DEFENDANT KEDROFF

The defendant, for his answer to the amended complaint herein by his attorneys, Boyd & Holbrook, respectively shows to the Court and alleges:

1. The defendant denies that he has any knowledge or information sufficient to form a belief as to the allegations contained in Paragraph "First" of the amended complaint herein, and denies each and every allegation contained in Paragraphs "Second" and "Third" of the amended complaint herein.

Wherefore, the defendant prays judgment dismissing the complaint herein, together with costs and disbursements.

Boyd & Holbrook, Attorneys for Defendant, Office and P. O. Address, 60 Broadway, Borough of Manhattan, New York 4, New York.

(Verified by J. Kedroff on June 26, 1945.)

[fol. 7] IN SUPREME COURT OF NEW YORK

AMENDED ANSWER OF DEFENDANT FEDCHENKOFF

Defendant, Benjamin Fedchenkoff, as Archbishop of the Archdiocese of North America and the Aleutian Islands of the Russian Orthodox Greek Catholic Church, by Philip Adler, his attorney, for his amended answer to the amended complaint herein, alleges:

First.—Denies each and every allegation contained in paragraph "First" of the amended complaint, except that this defendant admits that plaintiff was incorporated on April 8th, 1925.

Second.—Denies each and every allegation contained in paragraphs "Second" and "Third" of the amended complaint except that this defendant admits that both defendants did not deliver to plaintiff possession of the premises specified in the amended complaint.

For a First Affirmative Defense This Defendant, Alleges:

Third.—At all times hereinafter mentioned, the Russian Orthodox Greek Catholic Church (also known as the Christian Orthodox Catholic Church of the Eastern Confession and the Russian Orthodox Church and hereafter referred to as the Russian Orthodox Church) was and still is an unincorporated religious association composed of many millions of members including those known as the clergy thereof, having certain territorial sub-divisions known as dioceses, one of which is the Diocese of North America and [fol. 8] the Aleutian Islands and having certain rules which have the force of contract among the members and subordinate organizations of said Church. Such rules provide for said Diocese of North America and the Aleutian Islands, a ... of administrative and ecclesiastical officer known as the Archbishop thereof, who, in association with others in a council, has full administrative authority thereof, under said rules, subject only to the Superior control of the Supreme Church Authorities located at Moscow in Russia and known as the Patriarch of Moscow and of all Russia and his Holy Synod having, by said rules, authority to appoint, suspend, or remove such Archbishop of said Diocese and fully to administer the same.

Fourth.—The defendant, Benjamin Fedchenkoff, on or about June 1934, was appointed, by the Supreme Church Authority of Russian Orthodox Church, to wit, the Patriarch of Moscow and all Russia and his Holy Synod as Archbishop of the Archdiocese of North America and the Aleutian Islands, of the Russian Orthodox Church and as such Archbishop is entitled, under the rules of said Church, to possess, occupy, and use Saint Nicholas Cathedral, the premises mentioned in the amended complaint, as his resi-

dence, as a place for holding religious services and other purposes related to his office, and as the official seat and headquarters for the administration of the affairs both temporal and spiritual of the said Archdiocese.

Fifth.—Among the properties of the Russian Orthodox Church and the American Diocese thereof, is the premises [fol. 9] known as 13 to 15 East 97th Street, in the City and County of New York, known as Saint Nicholas Cathedral, being the same premises mentioned in the amended complaint. Said premises pursuant to the above rules of the Russian Orthodox Church are held in trust for the benefit of the accredited Archbishop of the said Archdiocese, to be possessed, occupied and used by said Archbishop as his residence, as a place for holding religious services, and other purposes related to his office and as the seat and headquarters for the administration, by him, of the affairs of the Archdiocese both temporal and spiritual.

Sixth.—This defendant, by virtue of his appointment as Archbishop of the Archdiocese of North America and the Aleutian Islands is entitled to the possession, occupancy and use of the premises mentioned in the amended complaint.

For a Second Affirmative Defense this Defendant, Alleges:

Seventh.—Since its corporation in 1925, plaintiff has been wholly inactive and it has lost its status as a corporation by non-user and the persons, if any, who proported to authorize plaintiff to bring this action had no authority to do so and plaintiff has no authority or standing to bring this action.

For a Third Affirmative Defense this Defendant, Alleges:

Eighth.—The cause of action alleged in the amended complaint did not accrue within the time permitted by law [fols. 10-12] for the commencement of this action and the action is barred by the Statute of Limitations.

For a Fourth Affirmative Defense this Defendant, Alleges:

Ninth.—Recovery by plaintiff in this action is barred by plaintiff's laches.

Wherefore, this defendant demands judgment dismissing the amended complaint with costs.

Philip Adler, Attorney for Defendant Benjamin Fedchenkoff, Office & P. O. Address, 8 West 40th Street, Borough of Manhattan, City of New York.

(Verified by P. Adler, October , 1947.)

(Judgment in favor of defendants dismissing amended complaint with costs in the Supreme Court, State of New York—omitted in printing.)

[fol. 13] Supreme Court of New York, New York County, Trial Term—Part X

New York, October 9, 1947.

Before: Hon. Bernard Botein, Justice.

Appearances: Ralph Montgomery Arkush, Esq., Attorney for the Plaintiff, Robert H. Kilroe, Esq., of Counsel.

Philip Adler, Esq., Attorney for the Defendants.

Transcript of Evidence

(Stipulation waiving Civil Practice Act, Sections 439 and 440—omitted in printing.)

Mr. Adler: Your Honor, I have served notice on the other side for leave to file an amended answer and I under-[fols. 14-16] stand that there is no objection.

Mr. Kilroe: There is no objection, your Honor.

The Court: Is Kedroff represented here?

Mr. Adler: Yes, I appear for him, too.

The Court: Make that clear on the record, that Mr. Adler appears for both defendants, because in the answer you appear solely for the Church.

Mr. Adler: This answer is not appropriate to the defendent Kedroff.

Mr. Kilroe: I offer in evidence an act to incorporate Saint Nicholas Cathedral of the Russian Orthodox Church in North America in 1925.

Mr. Adler: * * * I reserve the right to argue the constitutionality of any part thereof if it becomes material.

The Court: Surely.

(Received in evidence and marked Plaintiff's Exhibit 1.)

(Pursuant to stipulation "colloquy of counsel in which Mr. Arkush, appellee's attorney, states that he was informed that Mr. Valerian E. Graves was the person actively attending to the detailed legal affairs of the plaintiff corporation and he has been dead for a number of years", is omitted in printing.)

[fol. 17] Archbishop Leonty Turkevich, residing at 1121 North Leavitt Street, Chicago, Illinois, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

[fol. 18] Direct examination.

By Mr. Kilroe:

Q. Are you a duly ordained priest of the Russian Orthodox Church?

A. Yes, sir.

Q. Russian Orthodox Greek Church, rather.

A. Yes, sir.

Q. When were you ordained?

A. 1905.

Q. What year did you come to this country from Russia?

A. It is the southern part of Russia.

Q. What is that?

A. I came here from the southern part of Russia.

Q. No, no. I said, what year did you come from Russia?

A. What year? 1906.

Q. And you have been a clergyman from that time, from the time you were ordained, up to date?

A. Up to date.

[fol. 19] Q. Have you made a study of the history of the Russian Orthodox Greek Catholic Church of North America?

A. Yes, I have.

Q. Did you write any books on the subject?

A. I edited two volumes of history of Russian Orthodox Church in North America.

Q. Would you give his Honor——

By Mr. Kilroe:

Q. Would you give his Honor a brief history, not a detailed history, of the Russian Orthodox Greek Catholic Church of North America?

(Colloquy)

A. The Russian Orthodox Church in America started in the end of the 17th Century.

(Colloquy)

Q. What year was that?

A. You say 17th Century? About 1793.

Mr. Kilroe: That would be——?

The Court: The end of the 18th Century.

Mr. Adler: He was a century off, was he?

Mr. Kilroe: That is right.

Q. All right, continue.

A. In Alaska and on Aleutian Islands. After that, Russian Orthodoxy was distributed in the United States [fol. 20] from San Francisco to other cities and Canada, to New York. In its history, changed the names of itself, as I remember, four times.

Q. Well, what were the names? What were the former names?

A. First, from 1793 until 1870 they called themselves the Russian American Mission of the Russian Orthodox Church. Since 1870 until 1904, they received the name Diocese of Alaska and the Aleutian Islands of the Russian Orthodox Church. Since 1904, when the Cathedral was transferred to the Atlantic Coast, the name was Diocese of North America and the Aleutian Islands of the Russian

Orthodox Church. And since 1924, we call the Church——

[fol. 21] By Mr. Kilroe:

Q. Were you acquainted with the history of Saint Nicholas Cathedral, that is, the Cathedral that is the subject of this litigation?

A. Yes, sir.

Q. Well, would you tell his Honor briefly the history of the church and the Cathedral?

A. The parish of Russian Orthodox Church in New York starts in 1893 as brotherhood and a small group, asking to build a church and have regular services. And after a while they collect money and start the building on the same place as Saint Nicholas Cathedral is now, about 1905. They started in 1903, and the church was consecrated in 1905, and was a parish church at that time. After transferring the Cathedral Episcopal from San Francisco to New York, Saint Nicholas Church started as a Cathedral of Russia.

Q. That was in 1925?

A. Yes.

Mr. Adler: 1905.

The Witness: 1905.

Q. Well, take us up to 1925 in the history and stop there.

A. I was Dean of this Cathedral since 1914 until 1926 when I——

[fols. 22-25] Q. No, we will take that up later. In 1925, you were the Dean of the Cathedral, you say?

A. Yes, I was.

Q. Were you present at the first meeting of the trustees of Saint Nicholas Cathedral of the Russian Orthodox Church in North America, which was held on April 23, 1925?

A. Yes.

Q. I show you a copy of the minutes of that meeting and ask you, first of all, does that refresh your recollection of the meeting, and, second, if that is a true copy of the minutes?

A. I know that minutes.

[fol. 26] By Mr. Kilroe:

Q. How long did you continue as Dean of the plaintiff corporation up at the Cathedral?

Mr. Adler: Not the plaintiff corporation; of the Cathedral.

[fols. 27-34] Q. Yes, of the Cathedral, of No. 13-15 East 97th Street.

A. (Through interpreter) Since 1914 until 1926.

Q. What time in 1926 did you leave the Cathedral? What month? Do you remember?

A. March or April.

* * * * * * *

(Thereupon a recess was taken until 2:00 o'clock P. M.)

AFTERNOON SESSION

2:00 P. M.

Archbishop LEONTY TURKEVICH, resumed the stand and testified further as follows:

Direct examination.

By Mr. Kilroe (Continued).

[fol. 35] Q. What was the occasion of you leaving the Cathedral in April 1926?

A. The court issued a decree in favor of the Metropoli-
[fol. 36] tan who had been sent from Moscow as a representative of the Living Church.

Mr. Kilroe: I offer in evidence a copy of the judgment in the case of Kedrovsky v. Platon Rojdesvensky and Turkevich.

(Received in evidence and deemed marked Plaintiff's Exhibit 4.)

The Court: It is cited in your briefs?

The Court: I can take judicial notice of it anyway.

By Mr. Kilroe:

Q. Do you know of your own knowledge how long John Kedrovsky occupied the Cathedral?

Mr. Adler: I will concede that. Until 1934, when he died.

Mr. Kilroe: Yes. That is all.

[fol. 37] Cross examination.

By Mr. Adler:

Q. After the Russian Church was organized in Russia, there was first a Supreme Church Authority under the Patriarch of Russia, was there not, at the beginning, after the church was organized?

Mr. Kilroe: I suggest that you speak through the interpreter.

Q. I will repeat the question. Prior to the time of Peter the Great, was the Supreme Church Authority of the Russian Church a Patriarch and his Synod? Is that right?

A. Yes.

Q. Peter the Great abolished the Patriarch, did he not?

A. Yes.

Q. And there was established a body known as the Holy Synod, which was the supreme church authority of the Russian Church, is that right?

A. Correct.

Q. Now, the supreme authority of the Russian Orthodox Church from the time of Peter the Great to 1917 was this Holy Synod?

A. It is correct.

Q. In 1917 was there held in Russia a convention known as a Sobor?

A. Yes.

Q. By the way, you were a delegate to that Sobor, were you not?

A. I was.

Q. A Sobor is a convention, is it not, of representatives of bishops, clergymen and laymen from all branches of the Russian Church throughout the world, is that so?

A. That is correct.

Q. And that Sobor of 1917 was such a convention, was it not?

A. Yes.

Q. That Sobor passed various resolutions and enactments, did it not?

A. Yes.

Q. And these resolutions and enactments passed by that Sobor of 1917 to 1918 are binding upon the entire body of

[fol. 38] the Russian Church throughout the world, are they not?

A. Yes.

Q. One of the things that Sobor did was to restore the authority of the Patriarch and his Holy Synod, was it not?

A. Yes.

Q. The Sobors are the supreme church authority of the Russian Church of the entire world?

A. Yes.

Q. But in the intervals, between meetings of Sobors, it is the Patriarch and his Holy Synod that is the supreme church authority, isn't that so?

A. That is so.

The Court: Do you understand everything that is being asked?

The Witness: Yes, I understand.

Q. The Russian Church is a Missionary Church? Do you know what I mean? It establishes branches and missions outside of Russia?

A. No, it is Diocese.

Q. I understand, but in order to establish a diocese, you first have to establish a mission, don't you?

A. Yes.

Q. Now, the Russian Church established missions in Japan and in China, did it not?

A. Yes, but——

Q. Yes, and then it established a mission in the North American Continent, did it not?

A. Yes.

Q. Around 1800 or so?

A. Yes.

Q. The first mission was established in Alaska?

A. Alaska.

Q. And the headquarters of that mission were in Sitka, a city in Alaska, were they not?

A. Yes.

Q. And then other missions of the Russian Church were established in Canada and the United States, is that not so?

A. Yes.

[fol. 39] Q. Then in around 1895 the headquarters of the Russian Foreign Mission in North America were transferred to San Francisco?

A. Yes, in 1870.

Q. No, 1895 to San Francisco.

A. 1870.

Q. Oh, 1870 to San Francisco. Then isn't it a fact that up to that time the affairs of the Russian Church in the North American Continent, in the Aleutian Islands, in Canada, and in the United States, were governed by the church authorities in Russia?

A. Yes.

Q. And thereafter wasn't an Archbishop to govern the Mission, the Foreign Mission in the North American Archdiocese, appointed by the Russian Church authorities in Russia?

A. Yes.

Q. When was the first Archbishop appointed, approximately?

A. 1904.

Q. 1904. And who was that Bishop? Do you know his name?

A. Bishop Tikhon.

Q. Bishop Tikhon was appointed by the Holy Synod of Russia?

A. Yes.

Q. That was the supreme church authority?

A. Yes.

Q. And he was appointed Archbishop of the North American Archdiocese?

A. Yes.

Q. Which at that time was known as the Archdiocese of North America and the Aleutian Islands of the Russian Orthodox Church?

A. Yes.

Q. Bishop Tikhon was not elected by any clergymen, bishops or laymen in the United States, was he?

A. No.

Q. He was appointed from Russia?

A. Yes.

Q. And that was in accordance with the customs and rules governing the Russian Church, was it not?

A. Until 1917.

Q. That is right, until 1917. The land for the Saint Nicholas Cathedral was acquired and the Cathedral built [fol. 40] in around 1903 or so in New York City?

A. Yes.

Q. That is right. And the seat, the headquarters of the American Archdiocese was moved from San Francisco to Saint Nicholas Cathedral, New York, in about 1905, isn't that so?

A. Yes.

Q. And the Archbishop appointed by the supreme church authorities in Russia, the Archbishop of the American Archdiocese, moved into Saint Nicholas Cathedral?

A. Yes.

Q. And he lived there?

A. Yes.

Q. That Archbishop, so appointed, used Saint Nicholas Cathedral as the headquarters of his Archdiocese, did he not?

A. Yes, sir.

Q. And this Archbishop, so appointed, also used Saint Nicholas Cathedral as a place of worship?

A. Yes, sir.

Q. And that was in accordance with the rules governing the Russian Church?

A. Until 1917.

Q. I am talking about up to 1917. All right. Now, in 1905 you were still in Russia, were you not?

A. In Russia.

Q. Don't you know that while you were in Russia the Russian Church in Russia and the Russian Government sent large sums of money to the United States to build Saint Nicholas Cathedral in New York?

A. Yes, for helping resources which they find here.

Q. Now, wait a minute. You weren't here in 1905, were you? You weren't in the United States in 1905?

A. No.

Q. So of your own knowledge you don't know what resources existed in the United States in 1905?

A. I know——

Q. Isn't that a fact? You were in Russia at the time, weren't you?

A. (Through interpreter) I was in Russia, but Father [fol. 41] Hotovitsky wrote me in Russia. I knew him since my childhood and he wrote me letters and sent me magazines.

Q. And you say that Father Hotovitsky told you that some money was raised in New York for the Cathedral?

A. Yes.

Q. But you do know of your own knowledge that large sums of money were sent by the Russian Church and Russian Government from Russia to acquire the land and build the Cathedral?

A. Yes.

Q. Do you know the sums of money that were sent from Russia?

A. (Through interpreter) About $60,000 in American currency, about $120,000 in Russian currency.

Q. That is all you know about it?

A. Yes.

Q. Didn't you hear that larger sums of about $150,000 to $175,000 had been sent from Russia for the Cathedral?

A. (Through interpreter) Additional sums were sent, but I never hear those amounts.

Q. You came to the United States around 1906?

A. (Nodding yes.)

Q. Yes?

A. Yes.

Q. When you came here you found Archbishop Tikhon at the Cathedral?

A. Yes, sir.

Q. And you were then appointed Dean of the Cathedral, were you not?

A. Yes, sir.

Q. Are not the functions of a Dean to take care physically of the custody of the building?

A. Yes.

Q. That is all?

A. (Through interpreter) Yes.

Q. The Dean is appointed by the Archbishop, is he not?

A. (Through interpreter) He is appointed by the Synod upon representation by the Archbishop.

Q. The Synod in New York, not the Synod in Russia, isn't that so?

A. In New York.

[fol. 42] Q. All right. Now, let us clarify that. The Bishop rules the Archdiocese with the help of a Council which is known either as a Synod or a Consistory, isn't that so?

A. Yes.

Q. This Synod or Consistory or Council is appointed by the Archbishop?

A. Yes.

Q. But that is a local Council of the local Bishops in the Archdiocese?

A. Yes.

Q. The supreme church authority in Russia, whether it is the Patriarch or Holy Synod, has nothing to do with this local Synod?

Mr. Kilroe: If your Honor pleases, on this line of questioning, I believe the time that the question applies to should be stated because there have been certain changes.

Mr. Adler: Up to 1917.

Mr. Kilroe: Oh, I didn't know that.

The Court: He has constantly made that reservation. That is what I understood. We are only talking of up to 1917.

Mr. Adler: We can't know what happened later unless we know what happened before. Up to 1917, I am talking about.

By Mr. Adler:

Q. The Archbishop can remove the Dean at his pleasure, can't he?

A. (Through interpreter) Only upon representations to the Synod.

Q. Of his local Synod?

A. No, no, the Holy Synod in Russia.

Q. I am talking of the Dean.

A. Certainly. I was appointed from Holy Synod.

Q. In Russia?

A. In Russia.

Q. To be the Dean of the Cathedral?

A. Certainly.

[fol. 43] Q. The Archbishop of the American Archdiocese, you said, is appointed by the supreme church authority in Russia, is that right? (Through interpreter)

A. Yes.

Q. And the Supreme Church Authority in Russia can remove the American Archbishop? (Through interpreter)

A. Of course.

Q. (Through interpreter) And they can appoint somebody in his stead?

A. Yes, and they can appoint somebody else in his place, if there are reasons for relieving him of his office.

Q. Well, the Supreme Church Authority, whether it is the Patriarch or the Holy Synod, doesn't have to give any reasons to anybody? They can remove any Archbishop any time they want, isn't that so?

A. Until 1917.

Q. I am talking of 1917, up to 1917. They could remove him any time?

A. (Nodding yes.)

Q. And the Archbishop of the American Archdiocese is responsible and answerable to the Supreme Church Authority in Russia?

A. Yes.

Q. When you came to the United States, I believe you said you found Archbishop Tikhon?

A. Yes.

Q. How long did Tikhon remain Archbishop?

A. Until 1907.

Q. Until 1907. Did he leave the United States and go back to Russia?

A. Yes.

Q. After 1907 who became Archbishop?

A. Archbishop Platon.

Q. Was he appointed by the supreme church authority?

A. Yes, sir.

Q. In Russia?

A. Russia.

Q. How long did he remain Archbishop?

A. Until 1913.

[fol. 44] Q. And did he go back to Russia then?

A. Yes.

Q. Who became the Archbishop thereafter?

A. Evdokim Meschersky. Platon was until 1914.

Q. And Evdokim was appointed after 1914?

A. Yes.

Q. I think the last statement we have is that after 1914 Archbishop Evdokim Meschersky was appointed Archbishop of the American Archdiocese by the supreme church authorities in Russia?

A. Yes, sir.

Q. And Archbishop Evdokim remained such Archbishop in United States until 1917, did he not?

A. Yes, sir.

Q. When he returned to Russia?

A. Yes, sir.

Q. And he didn't come back?

A. No, sir.

Q. From the period that you are in the United States, from 1905 until 1917, all three Archbishops used and occupied Saint Nicholas Cathedral as a residence, as their headquarters as Archbishops and as a place of worship, isn't that so?

A. Yes, sir.

Q. And under the rules of the Russian Church is not one of the attributes of the office of the duly appointed Archbishop of the Archdiocese to possess, occupy, and use Saint Nicholas Cathedral? Do you understand me?

A. I understand.

Q. And the answer is?

A. Certainly.

Q. Certainly. That is right, possession, use and occupancy of Saint Nicholas Cathedral by anybody other than the accredited Archbishop appointed by the supreme church authorities in Russia would violate the rules and the constitution of the Russian Orthodox Church, would it not?

A. Yes.

Q. When an Archbishop appointed by the supreme church authorities in Russia, an Achbishop of the American [fol. 45] Archdiocese, resigns, dies or is removed, such Archbishop cannot appoint his successor, but his successor must be appointed by the supreme church authority in Russia, isn't that so? (Through interpreter)

A. Yes.

Mr. Adler: At this point, your Honor, I want to offer in evidence a portion of the enactments of the Sobor of 1917 and 1918 which in my opinion bear upon the specific issue in the case.

[fol. 46] May I read into the record the following portions of the exhibit which appears at 596 of the Kedrovsky record? I won't be too long, your Honor.

"Enactments

"concerning the general rules of the Supreme Administration of the Orthodox Russian Church, Nov. 4, 1917."

Mr. Arkush: Excuse me a minute. Would you have any objection to the witness following in Russian as you read?

Mr. Adler: None at all. But I wonder if he can do that. If he can follow it, very well.

"1st. The supreme authority, legislative, administrative, judicial and supervisory—within the Orthodox Russian Church is in the Sobor, which shall be convoked periodically, at established intervals and composed of bishops, clergymen and laymen.

"2nd. The Patriarchate is re-established and the Patriarch shall be the head of the Church Administration * * *

"Enactments

"concerning the rights and duties of Most Holy Patriarch of Moscow and all Russia."

[fol. 47] "2nd. The Patriarch shall

"(a) have charge of the internal and external welfare of the Russian Church * * *

"3rd. The Patriarch's name (instead of mentioning the Synod) shall be proclaimed at the Divine Services in all churches of the Russian Orthodox Church * * *

"Enactments

"concerning the Sacred Synod and Supreme Church Council.

"1st. The Administration of the Church affairs is in the all Russian Patriarch together with the Sacred Synod and Supreme Church Council.

"2nd. The Patriarch, Sacred Synod and Supreme Church Council are responsible to the All Russian Local Sobor, and shall submit to it their reports of their activities during the period between two Sobors * * *

"5th. For the purpose of calling the Diocesan Bishops to the Sacred Synod all dioceses of the Russian Orthodox Church are divided into the five following groups."

Then are (a), (b), (c), (d), (e) (Siberian).

"(N.B. To the Siberian group belong the North American Diocese and Japanese, Chinese and Ourmian Missions."

Then:

"Enactments

"concerning the categories of affairs within the jurisdiction of the organs of the Supreme Church Administration, December 8th, 1918,

"IV. Church administration and Church discipline.

[fol. 48] "1. Considering reports of the condition of dioceses.

"2. Confirmation of bishops elected to the diocese in their office, their appointment in proper cases and their retirements. * * *"

"Enactments

"of the Holy Sobor of the Russian Orthodox Church concerning Diocesan Administration, 14, 20, 22, February, 1918,

"Chapter 1. Diocese, its organizations and institutions.

"1. The diocese is a part of the Orthodox Church canonically ruled by a diocesan bishop.

"2. The boundaries of a diocese are established by the Supreme Church authority. * * *"

"Chapter 2. Diocesan Bishops.

"15. The diocesan bishop by the succession of authority from Holy Apostles is the head representatives of the local Church ruling the diocese with the joint cooperation of clergy and laymen.

"16. The diocesan bishop shall be elected as follows:

"After a diocesan chair has become vacant and before that vacancy is filled, the bishops of the district (as it was proposed to divide the whole Church in a few semiautonomous districts) or if there are no districts, the Sacred Synod of the Russian Church shall prepare a list of candidates, in which shall also be included the candidates who have been nominated by the diocese. After the list of candidates has been published in the diocese, all the bishops [fol. 49] of the district or all bishops who have been appointed by the Sacred Synod to take part in the election of the diocesan bishop, clergy and laymen of the diocese

jointly elect a candidate in accordance with special rules, whereat all persons mentioned in the list shall be voted together and the candidate who receives no less than 2/3 of votes shall be considered elected and his election shall be submitted to the confirmation of the Supreme Church Authority. If no candidate has received such majority, every candidate who received some votes at the first voting shall be voted separately and those who receive no less than half of all votes shall be submitted to the Supreme Church Authority.

"Notice: 1st. In extraordinary and exceptional cases if the welfare of the Church so requires, bishops may be appointed and transferred by the Supreme Church Authority.

"Notice 2nd. In a diocese where a large missionary activity shall be developed and where many non-Russians are living, the diocesan bishop shall be elected among the candidates who have experience in missionary work; otherwise bishops to such dioceses may be appointed by the Supreme Church Authority.

"Notice 3rd. Bishops to the foreign missions shall be appointed by the Sacred Synod."

The Court: That is as distinguished from districts?

Mr. Adler: As distinguished from districts within Russia, [fol. 50] the local dioceses where they allow elections, but as far as foreign archidioceses, the archbishops are appointed by the Supreme Church Authority, which has been the practice, as the witness has testified.

Mr. Arkush: Our contention is that since 1917 the North American Diocese was a diocese, not a mission. That has already been read by Mr. Adler from the Statutes of the Sobor.

Mr. Adler: All right, we will find out what happened after 1917. First let us find out what was the fact before that date.

Then I will read 23.

"23. Without the consent of the diocesan bishop no decision of any institution of the diocesan administration may be put into effect."

Mr. Arkush: Read 31, will you, please?

Mr. Adler: (Reading)

"31. The diocesan convention is a superior body with

the assistance of which the diocesan bishop rules the diocese."

By Mr. Adler:

Q. Now, these enactments that I have read were enactments of that Sobor of 1917?

A. Yes, sir.

Q. And which are binding, as you say, upon the entire body of the Church?

A. Yes, sir.

Q. Now a foreign mission or a diocese, foreign diocese, or a diocese abroad, or an archdiocese, is a branch and subdivision of the entire body of the Russian Orthodox Church, is it not?

A. Yes, sir.

Q. A mission or a diocese, or an archdiocese, either abroad, outside the confines of Russia, or within the terri- [fol. 51] tory of Russia, is not an independent Church, an independent member of the family of Orthodox Churches? That is not so, is it? Do you understand me?

Q. A foreign mission or diocese or archdiocese is ruled by an archbishop appointed by the Supreme Church Authorities in Russia, isn't that so?

A. After 1917?

Q. No, up to 1917.

A. Up to 1917?

Q. Yes.

A. Yes, but not after.

Q. Up to 1917?

A. Yes.

Q. These enactments that I have just read didn't change Russian usage and custom of the Russian Church, did they? They confirmed what had existed for years before, isn't that true?

A. No change.

Q. They did make changes?

A. Yes.

Q. All right. But you said before that the enactments of the Sobor of 1917 are binding upon the entire body of the Russian Church?

A. Yes.

Q. Now in 1917 while Archbishop Evdokim was still in the United States and while you were still Dean, didn't you

participate in or weren't you one of the incorporators of a corporation known as The Corporation of the Archbishop and Consistory of the Russian Orthodox Greek Catholic Church?

[fol. 52] Mr. Arkush: Excuse me. Will counsel state whether that was the Pennsylvania or New York corporation?

Mr. Adler: No, New York.

Q. You did?

A. Yes.

Q. Now, I show you what purports to be the by-laws of this corporation and point to Article 3 thereof, page 7.

A. I have it.

Q. I want you to look at Section 1. You have seen it. Section 1 reads as follows——

A. Yes.

Q. Well, you read it before I put it in the record. Have you read it now?

A. Yes? Article 13?

Q. Article 3, under the heading "Organization," Section 1.

Q. You subscribed to that statement, didn't you?

A. Yes.

Q. And that statement is correct, is it not?

A. Yes, sir.

Q. May I then read it?

"The Russian Orthodox Greek Catholic Church in North America will be ruled by the Archbishop (or his substitute) appointed by the Russian Holy Synod in Russia."

A. (Nodding yes.)

Q. Sometime in 1924 an action was brought in the Supreme Court in this county by Kedrovsky against Platon Rojdesvensky. Do you recall that?

A. Yes.

Q. You were a witness at that trial?

A. And against me too.

Q. Oh, yes, that is right. You were one of the defendants, that is right. And you were a witness in that trial, were you not?

A. Yes, sir.

[fol. 53] Q. You testified on behalf of Archbishop Platon?

A. Yes, sir.

Q. Archbishop Platon at that time was occupying Saint Nicholas Cathedral, was he not?

A. Yes, sir.

Q. And Archbishop Platon claimed that he was the duly appointed Archbishop of the Archdiocese by the appointment of the Supreme Church Authority in Russia, isn't that so?

A. Not exactly.

Q. Not exactly? Very well. Didn't you send a telegram to the Patriarch in Russia sometime in 1922 or 1923, asking that Archbishop Platon be appointed Archbishop of the North American Archdiocese?

A. I did send it.

Q. And didn't you testify at the trial that Archbishop Platon did receive such appointment as Archbishop of the American Archdiocese by the Patriarch of Russia?

A. Yes, sir.

Q. You didn't claim at the trial, which took place in 1924, that Archbishop Platon was Archbishop by virtue of any action of any bishops in the diocese of North America, but by virtue of some appointment by the Patriarch in Russia, isn't that so?

A. Yes, sir.

Q. Kedrovsky claimed that he was appointed Archbishop by the Supreme Church Authority in Russia, did he not?

A. Yes, sir.

Q. (Through interpreter) The lower court decided that Platon had been appointed, was the Archbishop?

A. Yes.

Q. But that decision was reversed by the upper courts, isn't that so?

A. Yes, sir.

Q. And the upper courts ruled that Platon was not appointed Archbishop of the American Archdiocese, isn't that so? He was not appointed by the Patriarch?

[fol. 54] By Mr. Adler:

Q. And both you and Archbishop Platon were enjoined [fol. 55] from interfering with Kedrovsky's occupation, possession and use of Saint Nicholas Cathedral?

A. Yes.

Q. So you and Archbishop Platon surrendered the Cathedral to Kedrovsky sometime in 1925 or 1926?

A. 1926.

Q. And since that time neither you nor Archbishop Platon nor anyone claiming to succeed him has ever occupied Saint Nicholas Cathedral up to this day?

A. Yes, sir.

(Colloquy)

Q. In 1924, in Detroit, a convention of a number of Russian churches in United States was held, was it not?

A. Yes, sir.

Q. That convention was held under the leadership or presidency of Archbishop Platon Rojdesvensky, was it not?

A. (Through interpreter) The meeting was started by Bishop Stephan, and then the Metropolitan Platon was invited.

Q. Very well. Now, this convention in Detroit passed various resolutions, did it not?

A. Yes, sir.

Mr. Adler: Now I offer in evidence so much of a resolution passed at that Detroit convention, reading as follows:

"1. Declare the Russian Orthodox Diocese in America a self-ruling Church, so that it shall be ruled by its elected Archbishop through a convention of Bishops and Council formed of elected members consisting of clergy and laity, and through periodical conventions of the American Church.

3. Beg the most Reverend Metropolitan Platon to head [fol. 56] the Church Administration and rule it, at first with the aid of the existing Episcopal and Diocesan Council, and workout in speedy order * * * plans of a permanent administration of the American Church for the future, according to the fundamentals of Orthodoxy, and must be organized on elective conventional basis.

"2. * * * Acknowledge that the orders of the Patriarch cannot be fulfilled even though they did take place because they are beyond his power. His orders can be enforced only by a trial. He was forced to do so.

"3. Beg Metropolitan Platon not to leave the Diocese henceforth but be it unanimously elected (I suppose it means be he) Archshepherd and Ruling Bishop as long as the Lord shall give him the power to serve the American Church."

By Mr. Adler:

Q. This was a portion of the resolutions passed at that Detroit convention, was it not?

A. Yes, that is part of the resolution.

Q. (Through interpreter) The Metropolitan Platon referred to in this resolution is the same man who was the defendant and who was defeated in the Kedrovsky case, was he not?

A. (Through interpreter) Yes, the same one.

Q. Was there another convention of the Church which describes itself in that resolution as the American Church held in 1935?

Mr. Arkush: 1934.

Q. (Through interpreter) In Cleveland?

A. Yes.

[fol. 57] Q. At that time had Metropolitan Platon died?

A. Yes.

Q. Who was elected as Archbishop of this American Church in place of Archbishop Platon?

A. Archbishop Theophilus.

Q. Archbishop Theophilus was also a witness for Archbishop Platon in the Kedrovsky case, was he not?

A. Yes.

Q. Yes, he was. And do you recall that Archbishop Theophilus, then called Reverend Pashkovsky, testified that Archbishop Platon had been appointed Archbishop of the American Diocese by the Patriarch?

A. Yes, sir.

Q. And do you recall that Reverend Pashkovsky then testified in the Kedrovsky trial that only the Supreme Church Authority in Russia could appoint an Archbishop of the American Diocese?

A. Yes, sir.

Q. Didn't he so testify?

A. Yes.

Q. All right. Now, do you know who consecrated Reverend Pashkovsky a Bishop?

A. Metropolitan Theophilus.

Q. No, no.

A. Metropolitan Platon.

Q. Metropolitan Platon. And who else? Well, one Bishop can't consecrate another Bishop. You may not

remember, but there were two other Bishops, were there not?

A. Yes.

Q. Can you supply me the names?

A. Archbishop Platon and Archbishop Eftimios of Brooklyn and Archbishop Panteleimon of Jerusalem.

Q. Do you know whether this consecration of Reverend Pashkovsky as Bishop Theophilus was confirmed by the Supreme Church in Russia, yes or no?

A. No.

Q. It was not?

A. No.

[fol. 58] Q. The Sobor of 1917, the enactments of the Sobor of 1917, required, did they not, that consecration of Bishops must be confirmed by the Supreme Church Authority in Russia?

A. Yes.

Q. But in the case of Reverend Pashkovsky there was no such confirmation of his consecration, was there? The answer is no, isn't it?

A. Confirmation was not.

Q. All right. There was no confirmation by the Supreme Church in Russia of the consecration of Bishop Theophilus?

A. (Nodding yes.)

Q. Canon law requires, does it not, that a priest to be consecrated a bishop must be consecrated by two other bishops?

A. Two or three.

Q. Two or fifty, it doesn't matter, but at least two.

A. At least two.

Q. And before one bishop can consecrate a priest as a bishop, the consecrating bishop must receive authority from the Supreme Church Authority, does he not?

A. Yes, but you——

Q. The answer is yes?

A. Oh, yes.

Q. Isn't it part of the church law that a bishop of one branch of the Orthodox Church, like the Church of the Patriarch of Jerusalem, has no authority to consecrate a bishop of another member of another Church, like the Russian Orthodox Church?

A. We recognize a presiding bishop as having leading part of consecration.

Mr. Adler: What is that answer?

(The answer was repeated in Russian through the interpreter as follows: "We regard as the main bishop the one who performs the act of consecration. The other bishops are invited.")

[fol. 59] Q. Do you mean to say that under canon law one bishop may consecrate a priest a bishop?

A. No.

Q. It requires at least two bishops, does it not?

A. Certainly.

Q. Both bishops must participate in the ceremony of consecration?

A. Yes.

Q. To participate in a ceremony of consecration a bishop must receive the authority of the Supreme Church Authority of his Church, isn't that so?

A. No.

Q. Do you mean to say that you, under canon law, have the right to consecrate a priest a bishop without authority from your Supreme Church Authority?

A. Oh, yes.

Q. Without consulting them or advising them?

A. I should ask permission.

Q. You should ask permission?

A. Yes.

Q. And if they don't give permission you have no such authority, isn't that so?

A. No.

Q. You do not have authority?

A. No.

Q. In other words, the permission of the Supreme Church Authority is necessary to authorize a bishop to consecrate a priest a bishop?

A. Yes.

Q. All right. Under canon law, may a bishop, say, under the authority of the Patriarch of Jerusalem consecrate or participate in a consecration ceremony of a person as a bishop of the Russian Orthodox Church?

A. Sometimes, yes.

Q. Well, he participates in it, but as a visitor.

A. As a visitor.

Q. But he cannot be one of the two necessary consecrating bishops, isn't that so?.

A. Yes.

Q. When you say "yes," I don't know what you mean. [fol. 60] You say he can or cannot? For example—let me withdraw my question and put it this way.

A. I may answer you.

Q. All right.

A. (Through interpreter) We have examples in Russia that there is a Patriarch from foreign parts participated in the consecration of a bishop, was acting bishop in the consecrating of a bishop in Russia.

Q. All right. Now, let me put it this way: May a Russian bishop, one Russian bishop, and one bishop under the jurisdiction of the Patriarch of Jerusalem or the Patriarch of Constantinople or any of the other Patriarchs, consecrate a Russian priest a Russian bishop?

A. Yes.

Q. All right. Now in the 1934 convention in Cleveland, was it?.

Mr. Arkush: Yes.

Q. (Continuing) Metropolitan Theophilus, who is the man who was consecrated as you said a moment ago without confirmation by the Supreme Church Authority in Russia was elected Archbishop to succeed Archbishop Platon, was he not?

A. Yes, sir.

A. And Archbishop or Metropolitan Theophilus has remained in that office to this day?

A. Yes, sir.

Q. By the way, to clear up a misunderstanding there is no difference between a metropolitan and an archbishop, is there, in rank or standing or power?

A. (Through interpreter) A metropolitan has the right to rule over a few archbishops.

Q. (Through interpreter) Well, isn't the fact as follows: That all metropolitans are archbishops?

A. No.

Q. That isn't so?

A. In the Russian Church, no.

[fol. 61] Q. (Through interpreter) Isn't the metropolitan an archbishop who lives in a large city, coming from the word "metropolis", the Greek word? Isn't that so?

A. (Through interpreter) No. He has a right over a whole district.

Q. (Through interpreter) That is right. And if an archbishop has the right over a whole district and his seat of government is in a large city, isn't such an archbishop called a metropolitan?

A. (Through interpreter) If he rules, then he is a metropolitan.

Q. Of course, if he rules he is a metropolitan. Now I believe you stated that the plaintiff corporation, Saint Nicholas Cathedral of the Russian Orthodox Church in North America, that you took care of paying taxes for that corporation?

A. Yes.

Q. You did?

A. Yes.

Q. What kind of taxes did you pay?

A. For water.

Q. Well——

A. For cleaning the streets.

Q. Well, you paid for water or cleaning the streets for the Cathedral, didn't you?

A. Yes.

Q. Did this plaintiff corporation have a bank account?

A. I don't know.

Q. By the way, wasn't that Cathedral exempt from taxes as a church property?

A. Church is an exemption but not a parish house.

Q. The residence?

A. Yes.

Q. Where the Archbishop resided?

A. Yes.

Q. Just that part?

A. (nodding yes.)

Q. Well, did you pay these taxes by cash or check?

A. Checks.

Q. Whose checks?

A. The checks of Saint Nicholas Cathedral.

[fol. 62] Q. But not this corporation?

A. By the order of the corporation, in the name of the corporation.

Q. At no time were you a trustee or other official of this plaintiff corporation? You were never a trustee or official?

A. Ex officio, they count me as a member of the corporation, ex officio.

Q. Is there any document, or are there any minutes showing that you were ex officio connected with that corporation?

Mr. Arkush: It is in evidence in the minutes?

A. It is in the minutes.

Mr. Arkush: "Trustees shall be the Bishop, the Dean."

Q. As Dean of the Cathedral it was your duty to make repairs for the Cathedral?

A. Yes, sir.

Q. To buy supplies for the Cathedral?

A. Yes, sir.

Q. And to pay the taxes for the Cathedral?

A. Yes, sir.

Q. All right. In 1937, another convention of this American Church was held in——

Mr. Arkush: New York.

Mr. Adler: I don't mean 1937. I mean 1946.

Q. (Continuing) —was held in Cleveland, was it not?

A. 1946?

Q. Yes.

A. Yes.

Q. And certain resolutions were passed at that convention?

A. Yes.

Mr. Adler: I offer in evidence a copy of the resolution [fol. 63] passed at that convention in Cleveland which was furnished to me by counsel for the plaintiff.

Mr. Kilroe: No objection.

(Received in evidence and marked Defendants' Exhibit A.)

By Mr. Adler:

Q. The Patriarch of Moscow and his Synod are the Supreme Authority of the Russian Orthodox Church today?

A. Yes.

Q. For several years after the Bolshevik Revolution in 1917 there were disturbances in Russia and the situation as to the Russian Church was not clear?

A. Yes, sir.

Q. But shortly thereafter the Patriarch and the Synod was re-established in Russia and would you say that for the past 20 or 25 years the canonical church in Russia is represented by the Patriarch and his Synod?

A. Now.

Q. You don't dispute that?

A. No.

Mr. Arkush: How many years?

Mr. Adler: Say 25 years.

The Witness: No.

Q. How many years? 20 years?

A. Since the time of Revolution, we don't know exactly who is the Living Church, the Patriarchal Church exists.

Q. Well——

A. Only after, since war, was elected in Moscow, Patriarch. We recognize him and name him in our Churches.

Q. In the prayers in your Churches?

A. Yes, sir.

Q. Since what time?

A. Since he was elected.

Q. Well, give us the year, 19 when?

A. 1944.

Q. 1944?

A. Yes.

[fol. 64] Q. Wasn't there to your knowledge a Patriarch of Russia before 1944?

A. Was disturbance.

Mr. Arkush: What is that?

Mr. Adler: He says there was disturbance.

The Witness: In Russia.

Q. In any event, you were in the United States and you have no personal knowledge of what occurred in Russia during that time?

A. (Through interpreter) Everybody knew it.

Q. You speak from common knowledge? Very well. (Through interpreter) in Defendants' Exhibit A, the following reference is made:

"Whereas the Patriarchal Authority is not consistent with the authority of the Synod of the Russian Orthodox Church abroad, this Sobor, hereby resolves that any administrative recognition of the Synod of the Russian Orthodox Church Abroad is hereby terminated, retaining, however, our spiritual brotherly relations with all parts of the Russian Orthodox Church."

What is meant by the term "Russian Orthodox Church Abroad"? To whom does that refer?

A. (Through interpreter) After the Russian Revolution, when conditions were unsettled, some Russian bishops outside of Russia constituted a synod.

Q. And they met at Karlovitz, did they not?

A. Yes.

Q. These Karlovitz bishops subsequently had their headquarters in Munich, Germany, did they not?

A. Now, yes.

Q. They had their headquarters in Munich, Germany, at the time of the Hitler regime, did they not?

A. No.

[fol. 65] Q. In 1934 did Metropolitan Theophilus, the head, who succeeded Metropolitan Platon, associate himself with the refugee bishops in Karlovitz?

A. Yes.

Q. And did he on behalf of this Russian Church in America, submit himself to the jurisdiction of the refugee bishops in Karlovitz?

A. (Through interpreter) Only in the nature of cooperation.

Mr. Arkush: I think we can explain it. There is no dispute about it at all.

Mr. Adler: All right.

Mr. Arkush: A temporary church administration was organized outside the borders of Russia.

Mr. Adler: Calling itself that?

Mr. Arkush: Calling itself The Russian Church Abroad, and it was intended to consist of four districts, the North American District, Western European District, the Near Eastern District, and the Far Eastern District, and bishops representing those four districts did sign certain temporary statutes which, if Mr. Adler desires, we can put in there.

The Court: Where were those statutes signed?

Mr. Arkush: At Karlovtsi, Serbia.

Mr. Adler: That is the same place I mentioned, Karlovitz.

Mr. Arkush: Under the patronage of the Orthodox Patriarch of Serbia.

Mr. Adler: That is controversial. Let us leave that out. The refugee group of bishops asserted certain powers of the Russian Church Abroad.

[fol. 66] Mr. Arkush: The point I am trying to make is that the North American Church was a part of that. It was a part of the organization. In fact, it turned out to be the leading part of the organization, because although the head of the Western European District signed, his own convention and people wouldn't ratify it, and they put themselves under the Ecumenical Patriarch of Constantinople. So, really, the only important Russian Orthodox group in this so-called Russian Church Abroad was the North American District.

The Court: Tell me this: Did this new organization purport to recognize the Patriarch in Moscow as the spiritual leader or was there proposed to be a complete severance?

Mr. Arkush: I will be glad to read it to you, if you want, or paraphrase it for you. According to their temporary statutes, it was to be temporary until religious freedom was established in Russia, when they would resume their place under the Patriarch of Russia.

Mr. Adler: Wait a minute. Will you also concede in this connection that Metropolitan Theophilus as head of this Church in America associated himself with this Karlovitz group, and that it was generally understood that this Karlovitz refugee bishops' group were supporting the

restoration of the Tzar and were allying themselves with the Hitlerian aims of that era?

Mr. Arkush: I will say what I think were the facts, because I think Mr. Adler only wants to get the exact facts.

[fol. 67] Mr. Adler: Right.

Mr. Arkush: All of our bishops more or less are refugee bishops. To call them refugee bishops doesn't mean anything. All Russians weren't in complete sympathy with the Soviet Government.

Under the constitution of this temporary organization, Metropolitan Theophilus was a part of the synod and represented the most important district. There is no question that outside of their ecclesiastical function one or more clergy or laymen connected with the central office of this synod did make some very indiscreet gestures towards—what do they call it—collaboration with Hitler.

Mr. Adler: All right.

Mr. Arkush: And that, of course, was the reason that they became so unpopular with our people.

Mr. Adler: So that in 1946, at the convention the American Church, the Russian Church in America, ruled that "Whereas, the Patriarchal authority is not consistent with the authority of the Synod of the Russian Church Abroad (that is the Karlovitz group) this Sobor does hereby resolve that any administrative recognition of the Synod of the Russian Orthodox Church Abroad is hereby (abroad meaning the Karlovitz group) terminated, retaining, however, our spiritual and brotherly relations with all parts of the Russian Orthodox Church Abroad."

[fol. 68] By Mr. Adler:

Q. Following this resolution of 1946, isn't it the fact that four bishops left the group of churches which passed this resolution in Cleveland?

A. (Through interpreter) Yes, that is a fact.

Mr. Adler: I think that is all.

Mr. Adler: May I just ask a couple of more questions on another point?

By Mr. Adler:

Q. Sometime in 1933 or 1934 did Metropolitan or Archbishop Benjamin come to this country? You know whom I mean, don't you? A. Yes, I know.

Q. And he came here, did he not, as the Archbishop appointed by the Patriarch and his Synod, the supreme church authorities of the Russian Church in Russia?

A. He said so.

Q. Well, did you accept him as such?

A. No. I don't know. He present his papers to Metropolitan Platon.

Q. Yes.

Mr. Kilroe: What was that answer? I didn't get it.

Mr. Adler: He presented his papers to Metropolitan Platon.

Q. You say he presented his papers to Metropolitan Platon. I show you this document, which I will mark for identification.

(Paper received and marked Defendants' Exhibit B for Identification.)

[fol. 69] Q. (Through interpreter) I ask you whether or not this document was presented by Metropolitan Benjamin to you or any representative of the group of churches with which you are associated, to your knowledge. If you don't know, say so.

A. (Through interpreter) I see this document for the first time.

Q. Did you learn that in 1924 and on subsequest dates the Patriarch of Moscow had suspended Metropolitan Platon?

A. I know it.

Mr. Adler: I think the last statement of the witness was that he knew that the Patriarch of Moscow had suspended Archbishop Platon for his activities in that Detroit convention, and this position that he took of independence.

The Court: Position of independence, is that what you said?

Mr. Adler: Independence or autonomy or whatever the word is. I don't think it matters much what the word is.

The Court: All right.

Q. And did you know that in 1935 the Patriarch of Moscow had issued another document suspending and condemning the action of Metropolitan Theophilus and all those associated with him who followed in the footsteps of Metropolitan Platon and had associated themselves in the resolutions of the Detroit convention?

Mr. Arkush: Did counsel say "Patriarch"?

Mr. Adler: Yes, the Patriarch of Russia.

Mr. Arkush: There was no Patriarch in 1935.

[fol. 70] Mr. Adler: Counsel makes the point that there was no Patriarch in 1935, and he may be right about it. I don't know, but I am sure he will agree there was an official Locum Tenens, which I believe means a person who holds the position in place of the Patriarch. But such Locum Tenens has all the powers and attributes of a Patriarch.

Mr. Arkush: I don't think I will concede that.

Mr. Adler: I will produce evidence along that line.

Mr. Arkush: His precise title was Acting Locum Tenens of the Patriarchal Throne.

Mr. Adler: In any event he was the chief official, the head of the Russian Orthodox Church.

The Witness: I heard that.

Mr. Adler: Now I offer in evidence the document I gave you dated January 5, 1935.

Mr. Arkush: Yes, we found that was very poorly translated and we would like to substitute a translation later.

Mr. Adler: All right, I will accept any corrections. I offer the translation.

Mr. Arkush: Subject to correction.

(Received in evidence and marked Defendants' Exhibit C.)

(Colloquy)

I offer in evidence an original document in the Russian language. I also offer into evidence the English translation of an original document in the Russian language relating to the the appointment of defendant Metropolitan Ben-

[fol. 71] jamin as Archbishop of the Archdiocese of North America and the Aleutian Islands by the Patriarch and his Synod, the Supreme Church Authority of the Russian Orthodox Church.

Mr. Kilroe: No objection.

Mr. Adler: I have given a copy of that to the other side.

(Defendants' Exhibit B for Identification was received in evidence and marked Defendants' Exhibit B.)

Mr. Kilroe: I have no objection, but I didn't finish with that, your Honor, and I would like to call your Honor's attention specifically to the first paragraph of that document.

By Mr. Adler:

Q. The Church to which you belong, of which you claim Metropolitan Theophilus is the head, by virtue of his election in the convention in Cleveland in 1934, sent representatives to a Sobor of the Russian Church which was held in Moscow in 1945, was it 1944 or 1945?

A. We tried to reach——

Q. You sent delegates there—the Sobor of the Russian Church was held in Moscow in 1944 or 1945?

A. 1944.

Mr. Arkush: No, January, 1945.

Q. January, 1945?

A. All right, January, 1945.

Q. (Through interpreter) At that Sobor were you advised that there were representatives of the various other Orthodox Churches, like the Church of the Patriarch of [fol. 72] Constantinople, the Church of the Patriarch of Jerusalem, and other Churches, or have you no information on that score?

A. They wrote and they spoke about it.

Q. Well, did the delegates who went there report that back to you?

A. They reported it.

Q. They reported that fact.

Mr. Adler: Now, I want to offer in evidence the document called the Ukase of the Patriarch of Moscow and All Russia, dated February 16, 1945, which appears on pages 11 and 12 of a journal called "The Russian Orthodox Journal," Volume 19, No. 6, issue of October, 1945.

(Colloquy)

(Received in evidence and marked Defendants' Exhibit D.)

Mr. Adler: Your Honor may want to read that now. In substance, it sets forth the position of the Patriarch on the American Church here, reaffirms the opinion on their rebellious conduct there, and lays down terms and conditions on which he would entertain their returning to the fold. That is it in substance.

I believe that is all I have at this time.

Re-direct examination.

By Mr. Kilroe:

Q. This Sobor that was held in Moscow in 1944, isn't it a fact that the American delegates or representatives to that Sobor did not reach Moscow in time to attend it? Isn't that right?

A. That is right.

[fol. 73] Mr. Adler: I will concede that. I understand that to be the fact. But I think you will admit, won't you, that they did have a talk with the Patriarch and exchanged documents and received this ukase which I have just offered?

Mr. Kilroe: I am informed that a report was simply made and that was the end of the thing.

Mr. Adler: They received the ukase, though, your delegates.

Mr. Arkush: If I may state it, subject to Mr. Adler's correction, the Russian Orthodox Church here was invited to send delegates to an All-Russian Sobor to be held in Moscow in January, 1945. The delegates selected by Metropolitan Theophilus were a bishop, two priests, and a layman. The Russian Government issued visas on their passports and offered the use of a military plane from Alaska to Moscow. Later, the Russian Government cancelled the visas on the layman's passport and put down the military plane that was carrying the bishop and one of the priests in the middle of Siberia and they had to take a train and they arrived a week late for the Sobor. They appeared before the Patriarch and the Synod, ren-

dered a full report in writing on the condition of the American Church, and a few days later received from the Patriarch the ukase which has been put in evidence.

Mr. Adler: That is my understanding of the facts.

[fol. 74] (Colloquy)

By Mr. Kilroe:

Q. (Through interpreter) Do you know how long after this Sobor of 1918 you received a copy of the various enactments that were made by the Sobor?

A. (Through interpreter) I and Father Kukulevsky each brought a copy of these enactments.

Q. Brought it back with you what date?

A. In August, 1918.

Q. (Through interpreter) What is the name of the organization of which you are an archbishop?

A. (Through interpreter) Russian Orthodox Greek Catholic Church of North America.

Mr. Kilroe: That is all.

[fol. 75] Re-cross-examination.

By Mr. Adler:

Q. When a Sobor passes certain resolutions or adopts enactments, is it not true that only a subsequent Sobor of the Church may modify or abolish these enactments?

A. It is.

Q. That is true, no other authority except a future Sobor has the power to change any of the enactments of a Sobor?

A. Yes.

Q. And since 1917 has there been any Sobor to your knowledge held of the Russian Orthodox Church which purported to change or modify any of the enactments of the Sobor of 1917?

A. In Moscow?

Q. In Moscow, in Russia.

A. (Through interpreter) That was the Sobor of the Living Church.

Q. But apart from that?

A. No.

Q. And you don't recognize the Sobor of the Living Church?

A. No.

By Mr. Kilroe:

Q. Isn't it a fact that between Sobors the High Church Authority has the right to make certain rules and regulations?

A. Yes.

By Mr. Adler:

Q. But not inconsistent with or overruling the enactment of the Sobor (through interpreter)?

A. (Through interpreter) In exceptional cases, Sobors, as it was in Russia, it was possible.

Q. Now, wait a minute. The Patriarch or the Holy Synod or anybody that has authority during the period between Sobors must follow the rules and enactments of the Sobor, must they not?

A. Yes, sir.

Q. (Through interpreter) They have no authority to change any of the rules of the Sobor?

[fol. 76] A. (Through interpreter) They have the right to issue special orders in exceptional cases.

Q. Well, show me where in that 1917 Sobor, in the enactments of that Sobor, such a right is given.

Mr. Adler: If the witness needs more time maybe he can study it over night and produce it tomorrow, if he can't find it now.

The Court: Will you ask him that, Miss Interpreter?

[fol. 77] George P. Fedotov, residing at 606 West 122nd Street, New York, N. Y., called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Arkush:

Q. What is your occupation, Professor Fedotov?

A. I am teaching Church history as visiting lecturer at the Union Theological Seminary. As a professor I am

also teaching in Russian Saint Vladimir Theological Seminary church history here.

Q. Describe briefly your educational qualifications.

A. I am graduated at Petersburg University in Russia, Petrograd University in Russia, with the Russian degree of Magistrate of General History.

Q. And that degree qualified you to teach in Russian universities?

A. Right.

Q. In what other educational institutions have you taught?

A. In Russia at the University of Petrograd and Saratov, and later, in the emigration, for 15 years I was teaching in Paris at the Russian Seminary there.

Q. That is the Russian Theological Seminary in Paris?

A. Russian Theological Seminary.

Q. In that Seminary and in the Russian Seminary here, candidates for the priesthood in the Russian Orthdox Church were being trained and are being trained?

A. Yes.

Q. And history has been your principal subject?

A. Yes.

Q. Are you also a writer on Russian Church history?

A. Yes, I am, on different subjects, particularly on history of the Russian Church.

Q. Speak a little louder.

[fol. 78] Mr. Adler: I am impressed with the qualifications of the witness and I don't think you need pursue that.

Mr. Arkush: You concede his qualifications?

Mr. Adler: Oh, yes.

Mr. Arkush: Will you also concede, Mr. Adler, that John S. Kedrovsky, who has been mentioned before in this trial, was the representative here of the so-called Renovated or New or Synodal Church in Russia?

Mr. Adler: I will concede that John S. Kedrovsky was appointed at a convention in Russia in 1923, which is described as the Sobor of 1923, as the Archbishop of the Russian American Archdiocese, and he was also appointed as the delegate and representative of that Sobor which is known, I believe, as the Church of the Holy Synod; and which I understand is sometimes referred to as the Living Church. Does that answer your purposes?

Mr. Arkush: Yes. I think, to be strictly accurate the appointment of Kedrovsky, all of which appears in the record on appeal in the case that has been mentioned, was made by the Synod and not by the Sobor.

Mr. Adler: Well, I will accept that.

By Mr. Arkush:

Q. Now, starting——

The Court: What do you have in mind by terming it the Renovated——

Mr. Arkush: Let us clear that right up, because there are [fol. 79] so many names that perhaps Professor Fedotov will explain the different names.

Mr. Adler: I think you and I can stipulate that.

Mr. Arkush: Let me see if that statement is satisfactory to you: The organization which resulted from the so-called Sobor of 1923 is called sometimes Living Church, sometimes New Church, sometimes Synodal Church, and sometimes Renovated Church.

Mr. Adler: That is correct.

Mr. Arkush: And Kedrovsky was the representative of that body here.

Mr. Adler: That is correct.

The Court: Is that the organization presently headed by the Patriarch and the Synod now?

Mr. Arkush: No, sir. That organization, I understand, has been entirely merged into the Patriarchal Church, and no longer exists.

Mr. Adler: It came back into the Patriarchal Church.

Mr. Arkush: Yes. It was a split-off which neither side in this litigation considers to have been canonical or valid.

Mr. Adler: But I believe the issue is academic because, as Mr. Arkush has stated, the Renovated or Living Church has been absorbed by the Patriarchal Church and no longer exists.

By Mr. Arkush:

Q. Are you the author of a v[illegible] entitled "The Russian Church Since the Revolution"?

A. Yes.

Q. And in the studies which you ma[illegible] preparation for [fols. 80-81] writing that volume, and [illegible] studies that

you have made, have you had occasion to see the text of an alleged ukase, alleged to have been issued by Patriarch Tikhon in 1920?

A. 1920, yes, I read it in many books.

Q. Have you that textbook here, the one I handed you?

A. I left it there.

Q. I am showing you a photostat of a document typed in the Russian language and ask you if you have within the last few minutes examined that document?

A. This document is issued by the Patriarch——

Q. No, I asked you if you examined it. Did you look at it a little while ago?

A. Not recently, but some years ago.

Q. Did you examine the copy that I just handed you a few minutes ago?

A. Yes.

Q. Have you looked at it sufficiently to remember whether that is the text with which you became familiar in your historical research?

A. Yes, it is the same text.

Q. Will you read to the Court in English simply the title and then the certifications that appear at the end? Start with the title and then the certifications.

[fol. 82] By Mr. Arkush:

Q. What was the condition, briefly, of the Russian Orthodox Church, and particularly of the central office, in or about November, 1920?

A. It was the time of the Civil War in Russia and at the same time of the acute terror by the Government.

Q. Be as objective as you can.

A. The South of Russia was cut from the North by the line of the Civil War, so the Patriarchal government was not able to communicate with the bishops outside the Bolshevik Russia, the bishops of the South Russia. That is why the Patriarch with the government issued this ukase or ediet, to give the right to the bishops outside——

[fols. 83-85] Q. Don't go into why it was issued. What we want to know is why the original document cannot be produced and why certified copies of the original document are not held here in America or anywhere else then in Karlovtsi?

A. I suppose the bishops of the South of Russia who

received this document, perhaps in one copy, they emigrated to Serbia, and then this document is certified by the Serbian Patriarch.

[fol. 86] (Received in evidence and marked Plaintiff's Exhibits 5 and 5-A, respectively.)

(Mr. Arkush stated the substance of Plaintiff's Exhibits 5 and 5-A to the Court.)

[fol. 87] The Court: What is an "eparchy"?
Mr. Arkush: Probably that is a bad translation.

By Mr. Arkush:

Q. Would that be a province?
A. Eparchy is the same as diocese.
The Court: It would include several bishoprics?
The Witness: One bishop in a diocese, in principle.

Mr. Arkush: Yesterday, your Honor, Mr. Adler offered a resolution that was adopted by the Detroit All-American Sobor of 1924. I would like to offer the rest of the minutes of that day's session, because it gives the background of the resolution.

[fols. 88-89] (Received in evidence and marked Plaintiff's Exhibit 6, consisting of 16 pages.)

By Mr. Arkush:

Q. Now, Professor Fedotov, briefly, will you start with the Bolshevik Revolution, the October Revolution, and describe the relations between the Russian Orthodox Church and the Government in Russia?
[fols. 90-91] This may be a test case for 300 cases. We only have statutes like the one in New York in one other State. That is New Jersey. We were not able to get a statute in Pennsylvania for some constitutional reason not applying to New York and New Jersey. We have most of our parishes in Pennsylvania. If we could persuade your Honor to rest your decision on two grounds, both the statute and on the legality, aside from the statute, of our autonomy, it would secure to us all our parishes anywhere in the United States or Canada.
[fol. 92] Mr. Adler: Well, I don't rest my canon rules

on political conditions. I say the canon rules remain, no matter what the political conditions are. They don't shift with changes in political government. They are permanent and are changed by the ecclesiastical body.

Mr. Arkush: That is the opposite of what we claim. When this country became independent, every Anglican church in the 13 Colonies was bound by canon law to the Church of England. It was the political fact, not the religious fact, that this was an independent country that authorized the establishment of an independent Episcopalian Church. You have to take political conditions——

Mr. Adler: This country didn't declare its independence of Russia. I don't see the analogy.

[fol. 93] Mr. Arkush: The analogy is almost exact. We are not claiming the autocephaly which the Episcopalian Church has here. We still consider ourselves as part of the Russian Church. We still acknowledge the Patriarch as our head, but we think that those close, minute, administrative regulations that were enacted by the 1917-1918 Sobor under the present political conditions in Russia and the political conditions that have existed ever since the Revolution, and particularly with tension that exists at this very moment between the two countries, are not appropriate and will not be enforced by any country.

Mr. Adler: I will just take another moment on that and will not pursue it further because I suppose we could talk endlessly on the point. I invite your Honor's attention to a case which unfortunately I omitted to cite, a leading case on the subject, Watson against Jones in 13 Wallace 679, I believe, which involves this position: The Presbyterian Church——

Mr. Arkush: I don't want to interrupt Mr. Adler, but this witness has to get back to his Seminary and I will make a concession to Mr. Adler, which I think will cover any objection. I will concede that in the case of a denomination having what is called an episcopal or synodal form of government that the lower units, such as the parishes, are bound by the discipline, rules, usages and decisions of the higher judicatory. No church lawyer can dispute that. I say that does not apply in this case. In the first [fol. 94] place they have had no tribunals. There have been no adjudications before a tribunal. We are going to

show that later. In the second place, the political conditions in different countries under different forms of government require a modification of that doctrine.

[fol. 95] By Mr. Arkush:

Q. State briefly the history of the relations between the Church and the Government, starting with the Bolshevik Revolution in 1917.

A. This subject is too much——

Mr. Adler: I suppose my objection is on the record, and your Honor overrules it?

The Court: Yes.

[fol. 96] A. (Continuing) I should first be permitted to limit my exposition——

Q. Give just the background that led up to the so-called Renovated schism.

A. Yes. Since the very start of the October Revolution, October, 1917, the relations between the Church and the new revolutionary state was inimical. It was a clash from the very beginning, because the Bolshevik party, the party of the minority, who just seized the power in State, had against themselves the whole upper classes and the overwhelming masses of the population and the Church, not only on ecclesi-stical reasons but also the national. Besides the Bolsheviks were atheists in principle.

Mr. Adler: Yo see, your Honor, where that is leading to. We are going to get bogged down in a jungle.

The Court: It can't be too much of a jungle. He has got to get back to class.

A. (Continuing) I will try to be as brief as I can.

The Court: Go ahead.

A. (Continuing) The Bolsheviks were atheists who never hid their desire to exterminate the religion as a superstitution, as a backward——

The Court: As an opiate of the people. Let it go at that.

A. (Continuing) From the very beginning they were excommunicated by the Patriarch for their attacks on the Church and they themselves in the beginning of January issued the decree of the separation of Church and State, with the confiscation of the whole Church property. So

[fol. 97] the relations were inimical. And during the Civil War, which lasted for two years, many priests were executed. Nobody knows exactly the number, but thousands of them were executed, not only on pretext of political crimes, counter-revolution, but simply in revolutionary passions, by the organs of government, Tcheka, and so on. So the whole ecclesiastical people lived for years in the utmost fear of acute persecution. They had this conscience to be persecuted by the State, as in the Roman Empire, for example. Psychologically it is undeniable. So in this atmosphere, this Renovated schism can get its true illumination.

After five years, five years after the Revolution, Bolshevists invented a new measure in the struggle with the Church. This was the schism. They invented the schism within the Orthodox Church. They used the existing differences within the Church on high political, social and religious matters. Within this Church existed of course a liberal or even a revolutionary trend which was discontent with the more conservative policies of the Patriarch and the majority, but mainly it was the kernel of the Renovated Church, but mainly the members of this new Revolutionary Church moved by the terror and by the fear, by the desire to escape from the general law, general sort of persecution.

Mr. Adler: May I interrupt here?

The Court: Of course, a good deal of this is irrelevant, but it is easier to take it. It is not very important.

Mr. Adler: In the interests of protection of my position as counsel for the defendants, I would like my position to be known. I make a formal motion to strike out everything [fol. 98] that the witness has testified to, on the ground that it incorporates hearsay, conclusions, matters of controversial opinion, and it is irrelevant and immaterial in the case.

The Court: Of course, most of it is irrelevant and immaterial but there emerge just a few ultimate historical facts which are admissible.

The Witness: Everything is controversial about this Revolution.

Mr. Arkush: It is incontroversial——

The Court: I don't think it is important. I will let it

stand. I will entertain a motion to strike certain parts later.

By Mr. Arkush:

Q. Let us go on with the account.

A. In the spring of 1922, it was a question of the enforced confiscation of so-called Church valuables.

Mr. Adler: How far are we going to go? I mean such detail——

The Witness: It is very important, because——

The Court: We are up to 1922.

The Witness: Because the reason of the schism. The pretext of this confiscation was rather good, to——

Mr. Adler: How do you know it was a pretext?

Mr. Arkush: These are historical facts.

The Court: Of course, he is right.

The Witness: It is my appreciation.

Mr. Adler: There is another man who has another appreciation.

[fol. 99] Mr. Arkush: This is the opinion of an expert.

The Court: It is not important. All you are concerned with is the ultimate historical fact that there was a confiscation. Whether it was on a pretext or not——

Mr. Arkush: No, your Honor. This is coming directly into the arrest and imprisonment of the Patriarch and that was opportunity that the Renovaters took to grab and seize the Church. It is extremely important and established by all the historians.

Mr. Adler: I have many witnesses who can contradict this witness.

The Court: Contradict him as to the motivations, but you won't contradict him as to the ultimate historical facts, will you?

Mr. Adler: Yes, but I don't know——

The Court: Was there a confiscation? Was there an arrest of the Patriarch? That is all I am concerned with.

Mr. Adler: These are matters of statistics covering a vast territory. How can one man talk about one thing——

Mr. Arkush: I will bring it out.

By Mr. Arkush:

Q. There was a famine condition, was there not?

A. Yes.

Q. As a result of that famine, the Government asked the Church to contribute to the relief of the sufferers?

A. Not asked, ordered them.

Q. Compelled them. And the Patriarch concurred with that, except——

A. The Patriarch offered to do it voluntarily, but instead [fol. 100] of the voluntarily giving up of these valuables, there was issued a decree by the Government confiscating all the valuables and sacred things.

Mr. Adler: May the record show that I have a running objection to all this testimony and I further request that Mr. Arkush ask the witness questions and not ask a question which will permit the witness to talk for hours?

Mr. Arkush: I am willing to do that. I just thought I would save time.

The Court: At this time I will overrule the objection and reserve to the defendants the right, after this witness is finished, to move to strike out certain portions of his testimony. I think that will be the most feasible method of proceeding.

Mr. Arkush: Is it your Honor's wish that I question him or permit him to go on?

The Court: You can do anything you want. I am definitely of the opinion that a good deal of this is irrelevant and incompetent, but I think it is simpler to take it and strike it out later, in view of the fact that there is no jury here.

By Mr. Arkush:

Q. Confine yourself to yes or no unless you think you should explain it. As a result of the Government's decree, were there wholesale and universal seizures in the Church of the icons and other valuables?

A. Yes.

Mr. Adler: I must protest.

Mr. Arkush: It is a historical fact.

[fol. 101] Q. And did many of the priests——

Mr. Adler: I am sorry. I must press that objection.

The Court: I overrule your objection specifically to this question. You still have the right to move to strike the preceding part.

Q. And did many of the priests resist?

A. Some of them, particularly, not priests, but the people, the believers resisted.

Q. Did many arrests arise as a result?

A. Many arrests, trials, and capital punishment.

Q. Were you present at one of those trials?

A. Yes.

Q. Which one?

A. In Petrograd, the trial of Benjamin, the Metropolitan with many priests and laymen.

Q. He was shot as a result of that?

A. He was shot.

Q. And that is a very famous event in Russian Church history?

A. Yes.

Q. Mentioned in all the books?

A. Yes. This moment was used by a group of radical revolutionary priests for a coup within the Church. The Patriarch was arrested and imprisoned but many of these priests belonging to the Living Church—it was a party within the Church, an organization—was admitted to a parley—of course by the Government, otherwise they could not go to the prison—and as a result of the parley, the Patriarch issued a letter, very short, giving him the right to pass over the papers.——

Q. Arrange?

A. Arrange—no, pass over the documents of the Patriarchal Government to the Bishop Agafangel, whom the [fol. 102] Patriarch nominated, elected as his locum tenens. But this group of the priests declared themselves the temporary government of the Church, High Church Government.

Q. It is usually referred to in the books as the H.C.A., High Church Administration?

A. Yes, High Church Administration, and that was the origin of this schism. In the utmost fear of the terror, most of the churches were enforced or forcibly transferred to

this group, in spite of the fact that this group had very few adherents among the population, the believers.

Q. Is it a historically established fact that if the priests or other officials of any particular parish would not adhere to the H.C.A., then the Government would proceed against them?

A. They were arrested and exiled, and so on. Some of them were shot, of course.

Q. Then this H.C.A. would appoint people to take their places, isn't that right?

A. Of course, of course.

Q. Who would be sympathetic to the H.C.A.?

A. Yes.

Mr. Adler: The same objection.

Mr. Arkush: I understood that he had a blanket objection to all this. He is just wasting time taking a specific objection.

Q. What did the H.C.A. then proceed to do? Did they proceed to call a Sobor?

A. They tried to introduce many reforms within the Orthodox Church which were not conformed to the canons of the Church, a married episcopacy, for instance, and so on. The next year, 1923, they gathered at that Sobor of which it was spoken here.

Q. Right.

A. In this Sobor——

[fol. 103] Q. Did the Patriarch himself call that Sobor?

A. No.

Q. Did he authorize——

A. Because this Sobor declared Patriarch deposed, this Sobor.

Q. Wait a minute, before you get to the Sobor. You say the Patriarch did not call this Sobor?

A. No.

Q. Did he authorize it to be called?

A. No.

Q. Did he instruct it to be called?

A. No.

Q. He was still under arrest?

A. Under arrest.

Q. And these Renovaters, so to speak, this H.C.A., they took it upon themselves to call the Sobor?

A. Yes.

Q. Of 1923?

A. Yes.

Q. All right. Will you read into the record the resolution as to communism which was passed by that Sobor?

Mr. Adler: Well, your Honor——

Mr. Arkush: I think this is very important.

The Court: Is it part of any exhibit?

Mr. Arkush: It hasn't been introduced yet. It is in this appeal book, or you can find it in your book.

Q. Can you find it in your book, Professor?

A. Here it is.

Q. Well, you read it, or perhaps I will read it. That will be easier.

Mr. Adler: I have my objection to that?

The Court: Is that in evidence?

Mr. Arkush: Not yet. It is in evidence in the old case. The minutes of this Sobor are official documents that have been published.

[fol. 104] Mr. Adler: In the old case, in the Kedrovsky case, the minutes of the Sobor of 1923 were introduced in evidence. The plaintiff relied upon them. The Court examined that question and it upheld the plaintiff's right to a due appointment. Now, he is trying to use an exhibit which was introduced in the other case, which supported the due appointment, to show that the due appointment was not due. In other words, he is trying to overrule the Appellate Division and the Court of Appeals.

Mr. Arkush: That is not the purpose of the offer. The purpose of the offer is to show that this Church in America, in Detroit, in 1924, was declaring itself temporarily autonomous because, with the support and collaboration and collusion and connivance of the Bolshevik Government, all Church authority, effective Church authority in Russia was put in the hands of these Renovaters, and these Renovaters at their own Sobor said these words, and I want to get these words in, your Honor. They are in their official minutes.

Mr. Adler: Your Honor, no civil court in the land will ever say that a part of a church has the right to secede because the reason why people secede is a matter for their own consideration, good or bad. The question is, did they secede? That is all.

Mr. Arkush: We did not secede.

Mr. Adler: The act controls that. The reason why is another thing. One man might have had reason A, another man reason B. We can't go into the multitudinous reasons——

[fol. 105] The Court: Is there any question as to the authenticity of the document?

Mr. Adler: No, I don't think so.

Mr. Arkush: Then I offer the proceedings of the Sobor of 1923 as printed in the proceedings in the so-called Kedrovsky case.

Mr. Adler: We are just cluttering up the record with a lot of stuff that has no bearing.

The Court: I agree with you it is completely irrelevant and immaterial to the plaintiff's prima facie case, but I think it is relevant and material to the issues raised by your affirmative defenses and since I think by this time the record clearly indicates that, as I said before, we are crossing party lines here, and in some measure anticipating defenses and in other measure rebutting ahead of the orderly procedure defenses which have been partially raised by the cross-examination of the preceding witness, I think that this is material. Probably nine-tenths of it is not very consequential to the issues here, but if he wants to offer it I can't start sifting it at this time.

Mr. Adler: Well, may I leave this final thought: On due consideration, I don't think your Honor will enter into the question whether the secession by this group, or any other group, was actuated by proper or improper motives.

The Court: Oh, no, I don't care. I have made it clear.

Mr. Adler: That is what he is going into. He says they [fol. 106] seceded because of Communism or something else. I say the "because" is irrelevant.

The Court: No, I am just interested in the ultimate historical, chronological facts here, which will establish something equivalent to a chain of title for the American Dio-

cese. Isn't this a question of which is legitimate and which is pretender? Isn't that it?

Mr. Adler: Yes, that is one of the basic questions here.

The Court: I think that to resolve that we have to take all of these previous Sobors or conventions into consideration—there has to be a chronology—starting with the Bolshevik Revolution.

Mr. Adler: On that theory then we ought to have a statement of facts, not a lot of opinions.

The Court: I should think a stipulation by you gentlemen would have sufficed.

Mr. Adler: If your Honor thinks it is relevant——

Mr. Arkush: My experience is that you will waste a great deal of time on a stipulation. We have a qualified historian here.

The Court: All right, proceed.

Mr. Arkush: I offer the extracts from the 1923 Sobor.

Mr. Adler: Don't offer the whole thing. Why don't you pick the part you want?

Mr. Arkush: I will assure you that if there is an appeal here we will just pick out the relevant portions. I don't want to take the time while the Professor is on the stand to pick out portions.

[fol. 107] Mr. Adler: My objection is noted on the record.

The Court: The objection is overruled, since it does not go to the authenticity of the document.

Mr. Adler: I object on the ground it is irrelevant and immaterial, and so on.

The Court: You are not objecting on the ground it is incompetent, but on the ground that it is immaterial and irrelevant?

Mr. Adler: That is right, immaterial and irrelevant, not incompetent. That is my error.

Mr. Arkush: It is the matter printed as an exhibit, beginning on page 493 and ending on page 543 of the Appeal book in the so-called Kedrovsky case.

Mr. Adler: Well, no, Kedrovsky——

Mr. Arkush: Kedrovsky v. Rojdesvensky.

(Received in evidence and deemed marked Plaintiff's Exhibit 6A.)

By Mr. Arkush:

Q. Was Patriarch Tikhon accorded an ecclesiastical trial by the Sobor?

A. When this resolution was presented to him——

Q. No, no, I don't think you got my question. Just answer yes or no.

The Court: What is the materiality of that?

Mr. Arkush: The deposition of Tikhon was invalid.

The Court: I know. He was reduced to his lay status. So what?

[fols. 108-109] Mr. Arkush: That was one of the moving causes of the autonomy at the Sobor in Detroit, because their loyalty to the Patriarch has never wavered from that time to this.

The Court: But is it my function to inquire into the reasonableness of the action of the Detroit Sobor?

Mr. Arkush: I think so.

Mr. Adler: For a civil court to do that?

Mr. Arkush: Not at all. Mr. Adler appears here to enforce the binding letter of these 1917-1918 Statutes on the American Church, although political conditions made that absolutely impossible and impracticable.

(Discussion ensued off the record between the Court and counsel.)

By Mr. Arkush:

Q. Isn't it true that one of the Renovaters himself wrote a book as to the history of the Renovated Church?

A. Yes, Professor Titlinoff, yes.

Q. Do they not in that book admit the support of the Russian Government?

[fol. 110] By Mr. Arkush:

Q. I want to ask a simple question and if you don't understand me, ask the interpreter. Did the 1923 Sobor accord to Patriarch Tikhon a trial before they deposed him?

A. No, there was no trial.

Q. That Sobor set up——

The Court: That, for example, is a fact which I think he

is qualified to testify to and which I can receive as evidence, even though it may be hearsay as far as the witness is concerned. That is a historical fact, but a good deal of the other material I am very doubtful about.

Q. Did Patriarch Tikhon later issue a public statement repudiating all the Acts of the 1923 Sobor and of the Renovaters?

A. He wrote "Invalid, Patriarch Tikhon."

Q. He wrote "Invalid" on what?

A. On the decree of the Sobor, the resolution of the Sobor, which was presented to him.

Q. Did the 1923 Sobor and their moving spirits set up a High Church Administration?

A. I am sorry.

Q. (Repeated through the interpreter.)

A. Yes, under the name of Synod.

Q. Holy Synod?

A. Holy Synod.

(Discussion ensued off the record between the Court and counsel.)

By Mr. Arkush:

Q. Now, relate very briefly what happened later as regards the Renovated schism on the one hand and the old Patriarchal Church on the other.

[fol. 211] A. Soon after the Sobor the Patriarch was released by the Government, released because the Bolshevists in their newspapers declared that they are no more interested in the victory of one Church party, that all parties, all religious parties were equally bad.

Q. About what date was that?

A. It was in the same year, 1923, some months after the Sobor. They had to use the schism, the fact of a schism in itself. They preferred to have two churches instead of one.

Mr. Adler: Who is they?

Mr. Arkush: The Government.

The Witness: The Government.

Mr. Adler: How do you know what the Government wanted? I would like to know that.

The Witness: They explain it in the papers at that time.

A. (Continuing) The Patriarch when he was in relative freedom—he was not quite free, he was confined in the Monastery——

Q. What they call "house arrest?"

A. He was confined in a Monastery, but he could communicate with believers—recovered practically all of the Churches which went over to the Renovators. Two-thirds of the Churches returned to the Patriarch. Only one third remained under the Synodal regime. So the general opinion of the Church was clear.

Q. When did the Patriarch die?

A. 1924, 1925.

Q. I have your book before me. It says March 8, 1925.

A. 1925, yes.

Q. Was a successor Patriarch immediately elected, yes or no?

A. No.

[fol. 112] Q. When was the next date that a successor Patriarch came into office?

A. Now it is difficult to say, because Patriarch named three Bishops who were arrested.

Q. No, I am not referring to them. When was the next Patriarch?

A. During the war, in 1943, I think, or 1944.

Q. 1943 or 1944. Archbishop Leonty has testified 1944.

A. 1944, yes.

Q. So there was no Patriarch between the death of Tikhon and the appointment or election of Sergius in 1943 or 1944?

A. That is right, for a period of twenty years.

Q. In the terminology of the Russian people and the Government and the Church Authorities, what is the significance of the word "Counter-Revolutionary"?

Mr. Adler: Well——

Mr. Arkush: Just a minute. Your Honor, that is the appelation that is given to Metropolitan Platon in that document that is in evidence.

A. In the language of the Bolshevik Party, everybody who doesn't accept the program is Counter-Revolutionary, of course, including Socialists, Mensheviks, they are called, of different nuances.

Q. Does the word imply active aggression or the use of physical force?

A. Not only that, but disagreement and opposition of opinion.

Q. Any intellectual disagreement is considered counter-revolutionary, is that right?

A. Yes.

Q. So that if a priest, layman, or bishop simply expressed disagreement with the principles of Communism he would be designated a counter-revolutionary?

A. Certainly, even if they did not express their——

[fol. 113] Mr. Adler: Of course——

Mr. Arkush: I am interpreting a word that is in evidence, your Honor.

Mr. Adler: My objection, I suppose, runs against all this testimony throughout. I don't want my failure to speak to indicate any acquiescence on my part. I merely fail to speak out of deference to the rulings of the Court.

Q. Somewhere in your book, I forget where, Professor Fedotov, you make the remark that under the Russian civil law, a parish, or what you refer to as Twenty, the Twenty, had the option of choosing what denomination they wanted to belong to or calling what kind of a priest, or if they wanted, a rabbi, or a Mohammedan clergyman, to be their pastor, is that right?

A. According to the Soviet law. Soviet law doesn't recognize any Churches, only cultural associations of twenty people, who certainly have the right to choose their religious creeds and so for.

Mr. Arkush: I am going to ask your Honor, under the recent amendment of the Civil Practice Act, 344-A, to take judicial notice of the following ordinance issued by the People's Commissariat of the Interior of the R. S. F. R. S., which is the Russian Soviet Republic.

Mr. Adler: What date is that?

Mr. Arkush: That is 1929. I will give you the official citation. It is published in the Fordham Law Review, January, 1939, page 8, footnote 43.

[fol. 114] "Resolutions and Orders of the religious conventions, conferences and their executives Bodies can be

carried out only by way of voluntary execution by the faithful."

[fol. 115] Archbishop Leonty Turkevich, resumed the stand and testified further as follows:

Cross-examination.

By Mr. Adler (Continued):

Mr. Adler: I want to offer in evidence the following portion of the resolution of the Detroit Convention of 1924——

Mr. Arkush: It is all in.

The Court: Aren't the entire minutes of that convention in, all the resolutions?

[fol. 116] Mr. Adler (Reading): "Whereas, under the laws and rules of said Russian Orthodox Greek Catholic Church and of said Diocese"—we can stipulate that that refers to the American Diocese?

Mr. Arkush: I think so.

Mr. Adler: Yes. (Continuing reading)—"the Ruling Archbishop of said Diocese held legal title to all properties, holding title to the parish properties in trust solely for the respective parishes and title to Diocesan properties in trust for the Diocese, and the North American Ecclesiastical Consistory, properly called Ecclesiastical Board, and later Diocesan Council, was but an advisory body acting under said ruling Bishop, with no power to bind the said ruling Bishop, and of which the ruling Bishop was not a member and had no title to or control over any Parish or Diocesan properties."

Q. You were going to look something up for me last night. Did you find what you were looking for?

A. No.

Q. You couldn't find it

A. I couldn't find it.

Q. You are now a bishop, are you not?

A. Yes, sir.

Q. When were you consecrated?

A. In 1933.

Q. By whom?

A. Metropolitan Platon.

Q. And whom else?
A. Bishop Theophilus.
Q. Yes.
A. And Bishop Alexis.
Q. Bishop Alexis?
A. Yes.
Q. With what Church is Bishop Alexis connected?
A. With our Church.
[fol. 117] Q. Was your consecration as a Bishop confirmed by any Church body, any Church organization?
A. Only by Synod of Bishops.
Q. Only by the Synod of Bishops in this country?
A. In this country.
Q. It was not confirmed by any other Church authority?
A. No.
Q. You recall, don't you, that the enactments of the Sobor of 1917, which you said were binding, required that confirmation of Bishops be by the Supreme Church Authority in Russia? You recall that?
A. Yes.
Q. But you didn't follow that provision?
A. On the occasion of Church disorders outside America.
Q. First we will come to the fact and then the explanation. The fact is that you did not follow that?
A. No.
Q. And you justify that failure to follow that because of Church disorders, is that your view?
A. Yes.
Q. In 1933 you claim there were Church disorders in Russia?
A. We followed the Ukase of 1920.
Q. We followed the Ukase of 1920?
A. Yes.
Q. You know that in 1933 the United States Government recognized the Russian Government, don't you?
A. Yes.
Q. That was about the time you were consecrated a bishop?
A. Yes.
Q. And diplomatic relations with Russia had been established?
A. But not Church.

Q. Wait a minute. Diplomatic relations had been established?

A. Certainly.

Q. And do you recall that one of the conditions of the recognition of the Soviet Union by this country was that [fol. 118] the Soviet Government guarantee religious freedom to everybody within their territory? Do you recall that?

A. May I——

Mr. Arkush: That isn't so.

A. (Continuing) May I explain?

Q. No. Do you recall first? Do you remember that, that one of the conditions for the recognition of the Soviet Union by this country was that the Soviet guarantee religious liberties?

The Court: (Addressing interpreter) Repeat that to him.

(The question was repeated through the interpreter.)

A. Yes.

Q. You recall that?

A. (Through interpreter) Yes, I remember that religious freedom would be guaranteed.

The Court: No, ask him if he also remembers whether that was a condition laid down by this Government before it would recognize the Soviet Union. That is the second part of the question.

(The question was repeated to the witness through the interpreter.)

The Witness: Yes, I remember.

By Mr. Adler:

Q. Now, isn't it a fact that your consecration as a bishop was confirmed or was referred for confirmation to the Synod of the refugee bishops of Karlovitz?

A. No.

Q. It was not?

A. No.

[fol.119] Q. Did you as an official of your Church recognize the authority of the Synod of Karlovitz?

A. Not that time.

Q. At any time?

A. Not that time.

Q. Well, 1933 means you did not then?

A. No.

Q. Did not recognize it?

A. Did not recognize it.

Q. Isn't it a fact that at the convention in 1934 where Bishop Theophilus was appointed head of your Church that relations were established with the Synod of Karlovitz?

A. After the Sobor of Cleveland?

Q. Yes.

A. In 1936.

Q. 1936, was it?

A. 1936.

Q. That was the first time that your Church gave recognition to the refugee bishops in Karlovitz?

A. (Nodding yes.)

Q. Now I want to clear up the question of the payment of the taxes by you. While you were Dean of the Cathedral from 1906, let us say, to 1917, you paid the taxes and water rates and paid for the supplies for the Cathedral?

A. Yes.

Q. That was your job, part of your work as Dean?

A. Yes.

Q. (Through interpreter) Where did you get the money for that?

A. (Through interpreter) We made collections in the church.

Q. Yes, but the collections in the church were used for the purpose of paying these charges, were they not?

A. Yes.

Q. And you said, I think, that these taxes and water rates and so on were paid by check?

A. Yes.

Q. By whose check?

A. The name of——

Q. Bishop?

A. No.

[fol. 120] Q. (Through interpreter) Whose check?

A. (Through interpreter) They were the checks of our church, Saint Nicholas Church.

Q. Saint Nicholas Church?

Mr. Arkush: That was not the translation. It was Saint Nicholas Cathedral.

Q. In other words, there was an account in the name of Saint Nicholas Cathedral?

A. Yes.

Q. Who opened that account? A. (Through interpreter) I opened that account together with the First Assistant Priest.

Q. And did you sign the checks?

A. Yes.

Q. Did you open that account under the direction of the Archbishop?

A. (Through interpreter) Everything was done according to his orders.

Q. (Through interpreter) When you came back from Russia from that Sobor of 1917 you resumed your duties as Dean, say, in 1918, did you not?

A. Yes.

Q. (Through interpreter) And this account was continued through 1918 up to 1926, was it not?

A. It seems to me so. I think so.

Q. So that after this corporation was organized in 1925 you continued, after the incorporation, to pay the taxes and the dues in the same manner from the Cathedral account which you had had for years before? That is the fact, isn't it?

A. That is the fact.

Q. You don't mean to convey the impression that you used the money of this corporation to pay the taxes, do you?

A. No.

Q. All right. You used the collections in the Cathedral to pay the taxes after 1925, just as you did for so many years before?

A. Yes.

[fol. 121] Q. As a matter of fact, the corporation had no money at all?

A. But the corporation exists.

Q. I understand. But you can exist poor, you know.

(Through interpreter) The corporation had no money when it was organized, did it?

A. (Through interpretr) The organization helped us in other manners, in other ways.

[fol. 122] Q. I ask you whether you know whether the corporation contributed any money for the maintenance and upkeep of the Cathedral at any time since its organization?

A. (Through interpreter) I don't think they ever gave anything directly, but through other people, wholly their assistance.

Q. You mean the corporation asked other people to contribute to the Cathedral?

A. (Nodding yes.)

Q. But the Cathedral itself never gave a penny to the corporation, isn't that so?

Mr. Arkush: I don't know what that means, the Cathedral never gave a penny to the corporation.

Mr. Adler: I am sorry.

The Court: You meant it the other way around.

Mr. Adler: I meant it the other way around.

A. (Through interpreter) No money directly.

Q. The corporation never had a penny to give, isn't that so? (Through interpreter)

A. I don't know.

[fol. 123] Q. Now, after you came back from Russia in 1918 you found in possession of the Cathedral a man by the name of Bishop or Archbishop Alexander?

A. Yes.

Q. Then he invited Archbishop Platon, didn't he, around 1920, 1921, or 1922, along those years?

A. About that.

Q. Then Archbishop Alexander left and Archbishop Platon remained?

A. Yes.

Q. And Archbishop Platon remained from 1922 to 1926 when by virtue of the Kedrovsky decision he left?

A. Yes.

Q. So Archbishop Platon remained, let us say, in 1923 and 1924 in the Cathedral? He was in possession?

A. (Nodding yes.)

Q. He remained in possession throughout 1925 too, didn't he?

A. Yes.

Q. (Through interpreter) This corporation was organized in April, 1925. Was there any change in possession after the corporation was organized or did the possession of Platon remain as before?

A. (Through interpreter) Platon remained the active chairman of the corporation.

Mr. Adler: Will you stipulate, Mr. Arkush, that the opinion of Judge Ford in favor of Archbishop Platon was handed down on December 24, 1924?

Mr. Arkush: If you say so.

Mr. Adler: It appears in the record. And that the notice of appeal from the judgment was filed or served about January 28, 1925?

Mr. Arkush: Yes.

Mr. Adler: And that the Appellate Division decision of reversal came down around October, 1925?

[fol. 124] Mr. Arkush: Subject to verification of those dates.

Mr. Adler: Yes.

All right.

Re-direct examination.

By Mr. Kilroe:

Q. In answer to a question a short time ago you stated that between Sobors, that is, the Sobor of 1918, made no provision for rulings by High Church Authority, isn't that right?

Mr. Adler: I don't think there was any such testimony, your Honor.

Mr. Kilroe: That is between Sobors—this was his answer—the Sobor of 1918 made no provision for action of any kind by Church Authorities for the change of any canonical rule. Wasn't that your question?

Mr. Adler: I don't think so.

The Court: There was testimony about extraordinary circumstances.

Mr. Arkush: My recollection of the question is this: Mr.

5 44

Adler asked the witness whether the High Church Authorities between Sobors were empowered to take action which was inconsistent with the Statutes of 1917-18. The witness said he thought that there was a provision on that, and your Honor then adjourned so as to give him an opportunity to find it.

Mr. Adler: And today he said he couldn't find it.

The Court: That is right.

By Mr. Kilroe:

Q. Isn't there a general principle in the Orthodox Church that any canon or rule can be suspended if practical neces-
[fol. 125] sity requires it?

A. Well, yes.

Q. What is the name of that rule?

A. We call that Church economia.

The Court: By whom can these rules be suspended?

The Witness: Who is left as the head of the body of the Church.

The Court: (Through interpreter) The head of any constitutent diocese can change it?

The Witness: (Through interpreter) The one at the head of the Church.

The Court: Does that mean the Patriarch or the High Church Authority?

The Witness: Yes.

The Court: All right.

By Mr. Kilroe:

[fol. 126] Q. In April, 1945, when this action was started, was the defendant John Kedroff a member of your Church?

A. No.

Q. Was he a priest in your Church?

A. John Kedroff?

Q. Yes.

A. He was——

Mr. Adler: Are you talking about the defendant.

Mr. Kilroe: I am talking about the defendant.

Q. The defendant in this action?

A. No, he is not a member of our Church.

[fol. 127] Q. Well, in 1944, do you know what Church he was connected with?

A. Living Church.

Mr. Kilroe: Will you stipulate for the record that when this action was started by the plaintiff, the defendant, John Kedroff, was not a member of the——

Mr. Adler: I think so. Let us first fix the date when the action was started. I think, Mr. Arkush, you said April.

Mr. Arkush: I think so, April 9, 1945.

Mr. Adler: I will stipulate that the defendant, John Kedroff was not at that time a member of the group to which the witness belonged.

Mr. Kilroe: And will you further stipulate that at that time he was in possession of the Cathedral and the Cathedral's property?

Mr. Adler: No, that is another matter.

By Mr. Kilroe:

Q. Well, in 1945, when this action was started do you know who was in possession of the Cathedral and the Cathedral's property?

Mr. Adler: That is objectionable. That is calling for a conclusion.

The Court: Sustained.

Mr. Kilroe: I now offer in evidence an injunction in the action of John S. Kedrovsky against Saint Nicholas Cathedral of the Russian Orthodox Church in North America, dated June, 1926.

The Court: 1926?

Mr. Kilroe: Yes.

The Court: What materiality has that?

[fol. 128] Mr. Kilroe: This has——

The Court: It is after the action.

Mr. Kilroe: It has this materiality, your Honor: That John Kedrovsky brought an injunction against this corporation restraining them from interfering with the Church property, the Cathedral. This action never was terminated. It started and lapsed, but the injunction did not. Consequently this injunction lasted up until the date of John S. Kedrovsky's death, which carries us up to 1934, and that is the reason I am offering this.

The Court: What is the materiality?

Mr. Arkush: It tolls the statute, under Section 24 of the Civil Practice Act.

Mr. Adler: I don't see how an injunction——

Mr. Arkush: Section 24 provides that if an action is restrained by an order that the statute is tolled.

The Court: Is that certified?

Mr. Kilroe: No, but I can get it certified.

Mr. Adler: I don't raise any objection about that.

Mr. Arkush: It is the file copy, your Honor. May it be deemed marked?

The Court: It is offered solely for the purpose of tolling the statute?

Mr. Arkush: Yes.

The Court: I will receive it for that purpose. You may have an exception.

(Received in evidence and deemed marked Plaintiff's Exhibit 7.)

Mr. Kilroe: That is all, your Honor.

(Colloquy)

[fol. 129] By Mr. Adler:

Q. You mentioned the doctrine of economia before.

A. Yes.

Q. Are you familiar with that doctrine? Just yes or no.

A. Yes.

Q. In a general way?

A. In a general way.

Q. That doctrine of economia is not found in any printed book or text, is it? (Through interpreter)

A. Yes, I have it in every religious manual.

Q. (Through interpreter) The doctrine of economia is set forth in a religious manual?

A. (Through interpreter) Yes, it is contained in religious manuals.

Q. You don't have that religious manual with you, do you?

(Discussion ensued off the record between Court and counsel.)

Mr. Adler: As I understand it, the doctrine of economia is a rule which, like custom and usage, is applied in Orthodox Churches.

Mr. Arkush: Yes.

Mr. Adler: Now we will find out what the doctrine is.

By Mr. Adler:

Q. Isn't the doctrine of economia simply this: That in a difficult case, in exceptional circumstances, the Chief Church Authorities of a Church may stretch the rules a little bit? Isn't that so?

A. Yes.

Q. (Through interpreter) That is right. But that doctrine does not give the power to a bishop or a diocese to break the rules of the Church, does it?

[fol. 130] A. (Through interpreter) Yes, if there are orders from High Authorities to change it.

Q. Naturally, if the Supreme Church Authority gives me permission or orders me to do it I can do it, but first there must be the authority of the Supreme Church Authority?

A. Certainly.

Mr. Adler: All right.

(Witness excused.)

COLLOQUY

Mr. Adler: Now a word about this injunction. I believe——

Mr. Kilroe: We also have a photostat of the docket entries which had better go in to show the precise status of the action.

Mr. Adler: I will take your word for it.

Mr. Arkush: We have a photostat of it.

Mr. Adler: Tell me what it is. I will take your word for it.

Mr. Arkush: Let us put it in.

We offer the photostatic transcript of the docket entries in the action of John S. Kedrovsky vs. Saint Nicholas Cathedral of the Russian Orthodox Church in North America. May that be marked?

Mr. Adler: I have no objection.

(Received in evidence and marked Plaintiff's Exhibit 8.)

Mr. Adler: All that shows is that nothing happened after this injunction was granted, is that right?

Mr. Kilroe: That is right.

Mr. Arkush: There were two injunctions in effect. There was the personal injunction of Kedrovsky against Platon, Turkevitch, their agents and servants, against interfering [fol. 131] with the occupancy of the Cathedral by Kedrovsky. That is already in. We think that under the doctrine of disregarding the corporate entity your Honor would hold that that enjoined Platon, so long as he lived and continued as head of the plaintiff corporation, from interfering with the occupancy of the Cathedral by Kedrovsky so long as he lived. So we really don't need this order. But this order is cumulative.

[fol. 132] Mr. Adler: In other words, this injunction runs not in favor of Kedrovsky as an individual, but in favor of him as Archbishop, and consequently in favor of X, Y, Z, who may be Archbishop. So this is really——

Mr. Arkush: There is no dispute about that.

I would like to offer in evidence Finding No. 5 in the Kedrovsky case, which, incidentally, was submitted by the defendant Platon himself, who has been succeeded by the [fol. 133] Bishop Theophilus, who is the head of this present plaintiff, and which reads as follows—it is short, I will read it. (And this finding was not disturbed by the Appellate Courts at all)—"Title to the premises No. 13-15 East 97th Street, Borough of Manhattan, City of New York, are in the Russian Orthodox Saint Nicholas Cathedral, a domestic religious corporation, subject to a trust, for the uses of said Russian Orthodox Church, and the members thereof, according to the canons and rules of said Church, pursuant to which the Ruling Archbishop, or Archbishop of the North American Diocese is entitled to occupy the residential portion thereof as a dwelling, and to occupy the portion used for the Cathedral for the purpose of conducting religious services, and other official activities, the custody of the Cathedral portion being held by an officer known as the Dean of the Cathedral."

Mr. Arkush: The only trouble with that, your Honor,

is this: That there is no such corporation as that mentioned in this finding.

Mr. Adler: Oh, yes, there is.

Mr. Arkush: I beg your pardon. And it evidently was an inadvertent error made by counsel or perhaps a stenographic slip. The only evidence before the Court in that case as to a corporation holding title was evidence as to Russian Orthodox Saint Nicholas Church in New York, the certificate of incorporation of which was before the Court.

Mr. Adler: Yes, that is right.

[fol. 134] Mr. Arkush: Are you offering in the chain?

Mr. Adler: Yes, but we can stipulate it.

The Court: All right, read it into the record.

Mr. Adler: Yes.

Title to the premises in question was conveyed to a religious corporation known as Russian Orthodox St. Nicholas Church in New York. That is right, is it not?

Mr. Arkush: Right.

The Court: What is the date of that?

Mr. Arkush: It is dated November 3, recorded December 12, 1899.

Mr. Adler: I think that is right.

Then there was a conveyance by this corporation of this Cathedral to Evdokim Merschersky as Archbishop of the——

Mr. Arkush: Archbishop of Aleutia and of North America, of the Christian Orthodox Catholic Church of the Eastern Confession in North America.

[fol. 135] The Court: Have you got the date of that?

Mr. Arkush: Yes, sir, that is dated April 12, recorded April 17, 1916.

Mr. Adler: This conveyance being from a corporation to an individual had to have the consent or the permission of the Supreme Court.

The petition of the corporation and the supporting affidavit of the Archbishop Evdokim and the supporting affidavit of a priest, Kohanik, with exhibits attached thereto, set forth the reason for this conveyance from the corporation to the Archbishop. The reasons set forth are most instructive and I think decisive of a fundamental branch in the case and these documents, the order of the court, and

the supporting affidavits I offer in evidence. They appear on pages 571 to 591 of the record on appeal in the Kedrovsky case heretofore referred to.

You don't object to that, I assume?

Mr. Arkush: No.

The Court: It will be received.

(Received in evidence and marked Defendants' Exhibit F.)

Mr. Adler: May I say a word about that initial corporation which held title to it?

That corporation was organized under sections of the Religious Corporations Law which permitted the incorporation of a church of the Eastern Confession by the Envoy Extraordinary and the Russian Consul General duly accredited in the United States.

[fol. 136] The Court: That is the Ambassador?

Mr. Adler: I am using the language of the statute.

Mr. Arkush: Let us put that in, the certificate of incorporation.

Mr. Adler: The certificate of incorporation is part of the moving papers.

Mr. Arkush: Did you put that in?

Mr. Adler: That is all in there.

That same statute, which I think is now Section 91 of the Religious Corporation Law, says that the Ambassador and the Russian Consul General shall be the trustees of such a corporation.

Pursuant to that law, this original corporation was incorporated by the Russian Ambassador and the Russian Consul General, and they were the trustees of that corporation from 1899 to 1916. They held title to that corporation.

For a period of 17 years or so this corporation held record title to the Cathedral.

The petition and the supporting papers for permission to transfer to the Archbishops say this: That by custom of the Eastern Church, title to real property is held in the name of the Archbishop, and they say that many of the properties of the Diocese are so held by the Archbishop; that although record title is in the name of this corporation, the corporation has been wholly inactive, has held no

meetings at all, and that the management and control and administration of the Cathedral was in the hands of the Archbishop and his Council, and that they are the actual [fol. 137] owners, the Archbishop and his Council are the actual owners of this Cathedral, and that the title of this corporation is a naked one, without any beneficial interest in that corporation.

That is attested to by the Ambassador and the Russian Consul General and by the Archbishop and by the supporting priests. On these grounds, the court said, "All right, transfer the title to the Archbishop".

The Court: All right, we have it to the Archbishop. What is the next step?

Mr. Adler: One other observation. That transfer to the Archbishop from the corporation was not a gift to the Archbishop. It was a recognition of the actual realities, and this corporation didn't pay a penny for the deed, because that money had been contributed by Russia, and so on.

Mr. Arkush: And from America.

Mr. Adler: All right. And from America.

The next conveyance was—will you help me on that?

Mr. Arkush: Evdokim Meschersky, etc., to the Russian Orthodox Saint Nicholas Church in New York, dated February 6, recorded May 8, 1917.

Mr. Adler: It wasn't 1926.

Mr. Arkush: I said February 26th, recorded May 8, 1917.

Mr. Adler: That is right. In other words, about a year later, the Archbishop retransfers that back to the old corporation.

Of course, we must remember that the Kerensky Revolution had occurred in February and he was going to go back [fol. 138] to Russia, so he didn't want the title in his name and he gave it back to the corporation.

The Court: All right. What is the next step?

Mr. Adler: The next step is for them to prove, namely, a conveyance by this corporation to the plaintiff in April of 1925.

[fol. 139] Mr. Kilroe: I now offer in evidence a deed from the Russian Orthodox Saint Nicholas Church in New [fols. 140-143] York to the plaintiff corporation.

Mr. Adler: Now, your Honor, I think this is an important point.

Mr. Arkush: It has already been marked for identification as a plaintiff's exhibit.

[fol. 144] Mr. Adler: I would like to object to the introduction of this deed on the following grounds:

1. No evidence was presented that Mr. Oustinoff, who executed the deed on behalf of the corporation, plaintiff's grantor, was authorized to execute the deed. There has been presented no resolution of the board of directors or trustees of that corporation, authorizing the execution of the deed, and there has been presented no minutes of any meeting authorizing that transaction.

Second, it appears from the record, that the corporation, the plaintiff's grantor, the Russian Orthodox Saint Nicholas Church in New York, plaintiff's grantor, had no beneficial interest whatever in the Cathedral and was the mere custodian of the title, or, perhaps more accurately stated, bailee of the title, in the same way in which I give a man a book and say, "Hold the book for me."

The Archbishop told the corporation, "Hold this title for me."

In these circumstances, Mr. Oustinoff had no power to alienate title to the Cathedral to anybody other than the accredited Archbishop of the Archdiocese, appointed by the Supreme Church Authorities in Russia.

Now, the deed purports to be given to the plaintiff corporation, the head of which is Platon Rojdesvensky, who [fol. 145] was held in the Kedrovsky case not to be an Archbishop of the Archdiocese. Consequently, it appears on the face of the record that the transfer of the deed to the plaintiff is a diversion of the trust on which the corporation held the deed and consequently is void.

The Court: That issue can only be determined at the end of the entire case, but you may make your objection.

Mr. Adler: For my own protection and the protection of my rights.

Third, the deed is invalid because at the time it was executed in April, 1925, Oustinoff was no longer a trustee of the corporation under Sections 91 and 92 of the Religious Corporation Law, notwithstanding his recognition in

1925 by the State Department for diplomatic reasons as still Consul General.

Fourth, the deed is invalid because it lacks the signature of the Russian Ambassador, as required by Sections 91 and 92 of the Religious Corporation Law.

The act of 1942 purporting to validate such deeds without the signature of the Ambassador in my opinion is invalid because that act says that such a transfer without the signature of the Ambassador is valid if the deed is "otherwise valid." And I submit that the deed is not "otherwise valid," and consequently this act of 1942 does not apply, does not save the deed. If it be held that this argument is unavailable, then I say the act of 1942 is be-
[fols. 146-155] yond the power of the Legislature because it purports to affect vested property rights which had vested in 1925 when the trust was diverted and the Legislature in 1942 cannot validate a breach of trust committed in 1925.

Fifth, the plaintiff has shown no order of the Supreme Court, permitting the transfer by the corporation to plaintiff. It may be urged that such order is required under the Religious Corporations Law, where a corporation transfers religious property. If it be urged that the Act of 1925, incorporating the plaintiff, authorizes the corporation to convey to the plaintiff, I say that that Act must be construed to mean that the corporation may convey to the plaintiff if it otherwise complies with the law, namely, obtaining a permissive order of the Supreme Court.

Finally, if the Act of 1925 be construed in a contrary sense, then I say it is beyond the power of the Legislature to provide by general statute that all religious corporations must convey by permissive order of the court and then pass a special act saying that this particular corporation need not obtain such permissive order.

[fol. 156] (The minutes referred to were received in evidence and marked Plaintiff's Exhibit 14).

Mr. Kilroe: Now, if the Court pleases, I ask your Honor to take judicial notice of chapter 693 of the Laws of 1945, which is an act to amend the Religious Corporation Law in relation to the Russian Orthodox Greek Catholic Church of North America.

Mr. Adler: That is Article 5-C.

[fol. 157] The Court: Let us mark it in evidence with the understanding that while it is marked in evidence for the purposes of this trial, in the event of an appeal it need not be incorporated as part of the case on appeal, because, of course, I may take judicial notice of all of the statutes, but for our mutual——

Mr. Adler: It is all in.

The Court: I know, but for our mutual convenience it is better to mark them physically in evidence because we can refer to them more readily. So that will be received in evidence.

(Received in evidence and marked Plaintiff's Exhibit 15.)

Mr. Kilroe: If the Court pleases, there are three Sobors mentioned in this Act. One of the Sobors is already in evidence.

The Court: You mean the minutes of them?

Mr. Kilroe: The minutes of the Sobor. So I now offer in evidence the minutes of the 1934 Sobor and the 1937 Sobor.

Mr. Adler: What are you offering in evidence?

Mr. Kilroe: The minutes of the 1934 Sobor and the 1937 Sobor.

Mr. Arkush: The 1934 Sobor was the Sobor at which Metropolitan Theophilus was elected, which reaffirmed the autonomy of the American Church, and the 1937 Sobor was the Sobor at which the constitution, such as it is, of the American Church, was adopted, and which again re-[fol. 158] affirmed the autonomy of the Church, and also approved the temporary Statutes for the Russian Church Abroad, which Mr. Adler asked me to produce.

Mr. Adler: Are they in English?

Mr. Arkush: All in English.

Mr. Adler: I assume they are a lot of self-serving declarations, and I object to the production of these on the ground they are self-serving and immaterial. I am willing, however, to stipulate that certain actions were taken at these Sobors, which I think is all that is necessary for the purpose of this case.

Mr. Arkush: It may be, your Honor.

(Discussion ensued off the record between the Court and counsel.)

Mr. Arkush: It is stipulated for the purposes of this action that at the All-American——

Mr. Adler: Not All-American, at the Sobor of this group of Churches.

Mr. Arkush: Well, you can say this group of Churches.

Mr. Adler: Or the self-styled All-American.

The Court: Just identify it. It is not accepted as being binding on the defendants. Just accept it as terminology. Go ahead.

Mr. Arkush: At the Sobor of Russian Orthodox Greek Catholic Church of North America, held in Cleveland in 1934, Bishop Theophilus of Chicago was elected Metropolitan and Ruling Bishop of such Church.

[fol. 159] Mr. Adler: Of the District.

Mr. Arkush: Of the District.

Mr. Adler: To succeed Archbishop Platon Rojdesvensky.

Mr. Arkush: That is right.

Mr. Adler: The latter being the man who was the defeated defendant in the Kedrovsky case.

Mr. Arkush: Oh, well——

Mr. Adler: Let us identify him.

Mr. Arkush: That also at said Sobor, certain statutes for the administration parishes, known as the Normal Parish Statutes, were adopted.

That at a Sobor of said Church held at New York in 1937, certain temporary Statutes for the administration of the Russion Church Abroad were adopted, certain Statutes for the administration of the Russian Orthodox Greek Catholic Church of North America were adopted, and that at both said Sobors, 1934 and 1937, the temporary autonomy of said American Church, which had been authorized in 1924, was reaffirmed.

Mr. Adler: I will stipulate that the foregoing actions took place, but object to their value or materiality or relevancy to this case; in other words, that testimony to that effect would be offered.

Mr. Arkush: I think we ought to get the exact dates of the Sobors to tie them up with the statute.

It is further stipulated that the Sobor at Cleveland was

held on or about or between November 20th and 23rd, 1934, [fol. 160] and the Sobor at New York was held on or about or between October 5th and 8th, 1937.

Mr. Adler: Will you further stipulate that all the matter that you have referred to, the actions and resolutions of these two Sobors, do not relate in any way to Saint Nicholas Cathedral?

Mr. Arkush: I don't think so.

Mr. Adler: They didn't refer to it, did they?

Mr. Arkush: I don't know. There probably were some references to it.

Mr. Adler: All right. May I just clear up one further misunderstanding which I believe crept into the record?

The plaintiff offered in evidence a proposed order of 1926, June, 1926, submitted to Mr. Justice Mullan, and it was offered, I believe, in support of their plea that an injunction tolled the statute. After awhile, I withdrew my objection to this order and joined in its offer in evidence. On examination of this proposed paper, I find that it is nothing but a proposed order, not signed by the Judge. It is not an order at all. It is not an injunction at all. Consequently, in the nature of the case it couldn't toll the statute one way or the other. So I withdrew my consent to the introduction of that paper, which consent was given under a misapprehension.

The Court: The statement was made that it was signed.

Mr. Adler: That is what I thought, but here it is.

[fol. 161] The Court: I saw that it wasn't signed. I thought there was another original in the file somewhere.

Mr. Kilroe: We have a copy of the Clerk's minutes, your Honor, which are already in evidence, I believe.

Mr. Adler: That doesn't show what order, or what was——

Mr. Kilroe: Well, we have the whole file. You can examine it. There is only one order.

The Court: Have you a signed order there?

Mr. Adler: They haven't.

Mr. Kilroe: That is all there is in the case but the minutes show, your Honor, the Clerk's minutes——

The Court: He may have signed a different order which is missing from the files. Very often both sides submit an order. Who submitted that proposed order?

Mr. Adler: The defendants in that case, the plaintiff in this case.

The Court: That looks to me as though it were a counter-order. Who procured the injunction?

Mr. Adler: Kedrovsky did.

The Court: Kedrovsky being what?

Mr. Adler: The plaintiff in the other action.

Mr. Kilroe: That is right.

Mr. Adler: After Kedrovsky was declared to be the Archbishop he apparently brought an action against the present plaintiff seeking to enjoin it from interfering with his possession. What happened thereafter I don't know.

[fol. 162] The Court: Let me see that.

(Paper handed to the Court.)

The Court: This is probably a counter-order that was never signed, Mr. Arkush.

Mr. Arkush: Here is a bond——

The Court: I know, but evidently this is what happened: The plaintiff made this motion for a temporary injunction. Ordinarily the plaintiff's order, upon the granting of that motion, would be signed. This is an order submitted by the defendant on notice to the plaintiff, and this is evidently the order that was not signed. It may not very substantially from the order which was signed.

Mr. Arkush: Yes. Here is the order settling it. These papers are in bad shape, your Honor. They are badly mixed up.

The Court: Evidently there was an order, an injunctive order signed.

Mr. Kilroe: Yes. There was an undertaking furnished by the plaintiff.

Mr. Adler: Maybe it was an ex parte order. We don't know what ultimately happened.

The Court: Evidently there was a settled order signed, because we have here a memorandum on the settlement of the order, but it was the plaintiff's order which was signed and not the defendants'.

Mr. Arkush: I think the injunction against Platon was sufficient for your Honor to hold that the corporate entity would have been disregarded.

The Court: Reading this plaintiff's memorandum in con-

[fol. 163] junction with the unsigned order, it is quite evident that an order was signed enjoining——

Mr. Arkush: They certainly could have gotten an order.

The Court (Continuing) —enjoining the defendant. Why don't you go back to the Law Journal in the library and get the memorandum?

Mr. Kilroe: We will do that, your Honor.

Mr. Arkush: Before the end of the case.

Mr. Adler: As matters stand, your Honor is inclined to receive that unsigned order as some evidence of the existence of some injunction?

The Court: Isn't that in evidence now?

Mr. Adler: Yes.

The Court: I will strike it from the record.

Mr. Adler: Which one is that?

The Court: The unsigned order.

George P. Fedotov, recalled, testified further as follows:

Direct examination.

By Mr. Arkush:

Q. After the Sobor of the so-called Renovated Church held in Moscow in 1923 did the Government permit the Patriarchal Church to set up a Central Church Administration?

A. No.

Q. How long a time elapsed before such permission was granted?

A. About four years, until Sergius, locum tenens, concluded the agreement with the Soviet Government in 1927.

[fol. 164] Q. What was that agreement, in substance?

A. That the Church receive the Central Government, call a Synod, and acknowledge the loyalty towards the Government, has given up, or given pledge to give up all anti-Soviet politics and be loyal to the State.

Q. And in accordance with that agreement did Sergius issue an encyclical to all the Russian Orthodox clergy abroad?

A. Yes.

Q. What was the substance of that?
A. He required——

Mr. Adler: First, the date.

The Witness: The date? Oh, 1927, but I don't know exactly. I don't remember exactly.

By Mr. Arkush:

Q. In 1927?
A. Yes.

Mr. Adler: If he is giving the contents of a written document I would like to have the written document produced first, because this witness is just free to say anything then.

Mr. Arkush: I think it is in your possession, Mr. Adler, because it is one of the basic papers of the Patriarchal Church.

Mr. Adler: I have never seen it.

By Mr. Arkush:

Q. Well, is it a historical fact accepted by all writers on Russian Church history that the acting locum tenens, Metropolitan Sergius, demanded from all the Russian clergy abroad a written certificate of their loyalty to the Soviet Government?

A. Quite. Everybody knows.

[fol. 165] Mr. Adler: Just a moment——

Q. Don't answer yet.

Mr. Adler: I object to the question as calling for a conclusion, referring to a written document that is not in evidence.

The Court: Have you no written document?

Mr. Arkush: No, we don't have the text of it, but there is unanimous agreement on the fact by all writers——

Mr. Adler: I must dissent. I searched, in the preparation of this case, for every relevant document and I must say that nobody, until this minute, has ever mentioned to me the existence of any document of October, 1927.

Mr. Arkush: Well, we can prove it through your own witnesses.

Mr. Adler: Fine.

By Mr. Arkush:

Q. As a result of the persecution of the Russian Orthodox clergy were many bishops transported to Siberia?

Mr. Adler: I object to the form of the question as calling for a conclusion, something not within the knowledge of the witness. He says he left Russia in 1923.

Mr. Arkush: 1925.

Mr. Adler: Or 1925, whenever it was.

The Court: Sustained.

Q. As a result of your historical research into the history of the Russian Orthodox Church what is your best [fol. 166] estimate of the number of bishops who were arrested and sent to Siberia during the period 1917, say, to 1929?

Mr. Adler: I object to that.

The Court: Sustained.

A. Siberia was——

Q. No, don't answer.

A. May I answer or not?

Q. You are not permitted to answer. During the period 1923-1927, what was the attitude of the Russian Government toward the Patriarchal clergy as compared with the Renovated clergy?

[fol. 167] By Mr. Arkush:

Q. What was "Bezbojnik"?

A. That in English means "Godless, atheist". It is the title of a magazine and also of a daily newspaper dedicated to propaganda of atheism.

Q. Propaganda of atheism?

A. Yes.

(Colloquy)

Q. Now I am going to show you, Professor Fedotov, the Ukase of 1920, which is already in evidence, in both Russian and English. The Russian text is in the possession of some other people and I see they didn't come to court today. I call your attention to Exhibit 5-A, and particularly the words, "The circumstances of a Diocese finding itself cut off from the Church Government for any reason

or in the event of the interruption of the action of the Church Government," and also the words, "Should a Diocese be cut off from all communication with the Church Administration in consequence of military movements or by reason of the changing of boundaries of States, or should both the Church Administration and the Most Holy Patriarch be prevented from exercising their functions," and I ask you whether in your opinion substantially that state of facts existed with regard to the Diocese of North America and Alaska and the administration of the Russian Orthodox Church, referring to the Patriarchal Church?

[fol. 168] Mr. Adler: Just a minute. I object to that question.

Q. In the years 1923 to 1927?

Mr. Adler: I object to that question, your Honor. It is calling for a conclusion. It is incompetent, immaterial.

The Court: What state of facts do you mean, that this association of the various Diocese with the Mother Church——

Mr. Adler: No, the whole course of history——

Mr. Arkush: No. What happened, your Honor, is this: As Professor Fedotov has testified, with the connivance, support and cooperation of the Communist Party and the Soviet Government and the secret police particularly, this schismatic movement took place, which practically extinguished for the time being the administration of the Patriarchal Church. Now, the Patriarchal Church is the only Church recognized by either of the parties to this suit as the canonical, true church in those years, and the Renovated Church which was set up at the Sobor of 1923 had what protection and favoritism and privileges there were, even those not being so great. So that we say, in effect, in those years 1923 to 1927 this Diocese, which looked only to the Patriarchal Church, was cut off from the central office and was therefore justified in operating under the Ukase of 1920 which has been issued by the Patriarch and his Synod.

What I am very fearful of is that your Honor will be [fol. 169] persuaded by Mr. Adler to look on the opinion of the Appellate Division in the Kedrovsky vs. Rojdesvensky case as accurately reflecting the state of facts. The

Appellate Division simply did not realize—it was too early then, the facts were too recent, and there was no way of showing them—the Appellate Division did not realize, except Mr. Justice Martin, that there were two bodies, the schismatic body and the canonical body, and they simply acted as if there were but one Church. We realize now with——

The Court: I have allowed you a great deal of leeway in proving that. I allowed it on Friday.

Mr. Arkush: I don't want to gild the lily and, if we have proven it, I will stop there.

The Court: Because there, there was something in evidence which would allow a qualified historian to, within proper bounds, render an expert opinion. There at least we had the decree.

Mr. Arkush: Then I will press that question, if not in that form, in some other form, because I do want his opinion as to whether the facts of which he had some personal knowledge, and also with which he has a great deal of knowledge as a historian come within substantially the language of that Ukase.

Mr. Adler: Your Honor, I want to point to paragraph 10 of this ukase, Plaintiff's Exhibit 5-A, just a few words. It says this:

"All such measures (referred to in the ukase) as may be taken in conformity with the present decision must [fol. 170] upon the re-establishment of the Central Highest Church Authority be submitted to same for confirmation," which they never did.

Mr. Arkush: Yes, we did.

Mr. Adler: Excuse me, this witness has testified that this was just a temporary——

The Court: Reframe your question and let us get on.

By Mr. Arkush:

Q. Having in view the conditions in effect from 1922 to 1927, would you say that the Diocese of North America and Alaska was cut off from communication with the administration of the Patriarchal Church in Russia?

Mr. Adler: I object to the question as calling for a conclusion. It is incompetent, immaterial and irrelevant and there has been no foundation laid for it.

The Court: I think that is an ultimate conclusion. I will sustain the objection.

Q. Did the Patriarchal Church in the years 1922 to 1927 have an effectively functioning central administration?

Mr. Adler: Your Honor, I object to that on the same ground. It is grossly conclusory. In the first place——

The Court: Let him describe how it functioned, if at all. We will draw the conclusions.

Q. How, if at all, did the Patriarchal Church function in Moscow in the years 1922-1927——

[fol. 171] Mr. Adler: He left Russia in 1925. I don't think he is in a position——

The Court: Objection overruled.

The Witness: May I answer, sir?

The Court: Yes.

A. The first year, from 1922 to 1923, the Patriarch was imprisoned and had no administration at all, of course. Being liberated for four years, he lived in confinement in a monastery without any official organs of central administration.

The Court: We have had all this.

A. (Continuing) And certainly was not free, or under repression in his correspondence abroad.

Q. All right. Then he died when?

A. In 1925.

Q. Go on. Then from 1925 to 1927?

A. Up to the year 1927 there existed no Patriarchal central administration.

Q. All right. That is enough.

[fols. 172-173] Mr. Arkush: I offer in evidence declaration of Metropolitan Sergius, June 10, 1927, as printed on pages 95 and 96 of "People, Church and State in Modern Russia," by Paul B. Anderson, a typewritten copy to be marked.

(Received in evidence; to be marked Plaintiff's Exhibit 15A.)

Mr. Arkush: Now I offer a statement by Stalin, printed in Mr. Anderson's book at pages 101 and 102.

[fol. 174] The Court: Ask him this, as a historian, did

that statement reflect the position of the Soviet Government in 1927, at the time it was made?

You have an exception. This is expert testimony.

The Witness: Yes.

(Received in evidence, to be marked Plaintiff's Exhibit 15B.)

Cross examination.

By Mr. Adler:

Q. Professor, you left Russia in 1925, did you not?

A. Yes.

[fol. 175] Q. And by 1917 you had achieved a position of standing, had you, in Russian universities?

A. By the year 1917?

Q. 1917.

A. Yes.

Q. You were a Professor at a university in 1917?

A. I was Assistant Professor in Petrograd.

Q. How old were you in 1917?

A. 1917?

Q. Yes.

A. 33.

Q. And you had a position of influence and importance in Russia by 1917?

A. No, I cannot say this.

Q. Well, don't be modest.

A. No, not here.

Q. At 33 you were an Assistant Professor at a university, were you not?

A. If you like.

Q. And you had written about Church history, had you not, by that time?

A. No. My field, academic field, was the History of Middle Ages at that time.

Q. Very well. Whatever the subject was, you were an author by the time you were 33, weren't you?

A. Yes.

Q. And I take it that you find displeasure in the course of events in Russia following the year 1917, isn't that so?

A. Yes.

Q. The situation prior to 1917 was much more congenial to your ideas, was it not?

A. What do you mean by that, congenial to my ideas?

Q. Do you honestly entertain difficulty in understanding what I mean by that question?

A. Yes, I do.

Q. You do?

A. Yes.

The Court: He means personally you were happier under the regime before 1917.

The Witness: Oh, you mean before 1917?

[fol. 176] Q. Yes.

A. I was Socialist and Social Democrat for a time in my youth, and always in the opposition to the Czarist Government, so I felt not happy.

Q. You opposed the Czarist regime, is that it?

A. Yes.

Q. You are familiar, aren't you, with the condition of the Church in Russia under the Czarist regime?

A. Yes.

Q. Did you oppose or favor that position of the Church?

A. Opposed.

Q. Did you oppose it by any external act or just by internal conviction?

A. By conviction.

Q. But by no effort? You made no effort to express that opposition, did you?

A. I had no opportunity because I was not a public man and had no position even in the Church.

Q. Well, you will admit, will you not, that prior to 1917 the Russian Church was an arm of the Czarist Government?

A. Was what?

Q. Was an arm of the Czarist Government.

A. It is a very strong expression, but certainly the Church was not free in her social and political activity.

Q. The Church prior to 1917 was an aid and instrument of Czarist policy, was it not?

A. I repeat, it is too strong.

Q. You think my expression is a little too strong?

A. Yes.

Q. But watered down a little, it is substantially correct?

A. Yes, in politics, yes.

Q. And I assume from what you said that you will agree that the Czarist Government was an autocratic regime?

A. In law, but——

Q. Pragmatically, in practice. Will you deny that?

A. No. I don't wish to deny it, but there is a great dif-
[fol. 177] ference between the autocracy before 1905, the first Revolution, and after.

Q. Well, of course, but basically, broadly, the Russian Czarist Government was an autocratic regime, oppressive of the people, prior to 1917?

A. Now the term "autocracy" was the object of the discussion and arguments between the Government and Russian Parliament, so we considered that in law it was not autocratic any more. But of course it was oppressive, yes.

Q. I am not talking about law. I am talking about actual facts, actual experience. You lived in Russia and you observed facts, didn't you?

A. Yes.

Q. As a result of your observation, to be candid, wouldn't you have to admit that the Czarist Government was an oppressive regime of the people?

A. Yes, I admit.

Q. And that the Church participated in and helped the Czarist regime in that oppression?

A. Unfortunately in many cases it is true.

Q. All right. That is all I am trying to establish. Now, the Czarist Government had an official known as a Chief Procurator, who was the President of the Holy Synod which was technically the official Chief Ruling Body of the Russian Church, isn't that the fact?

A. Not quite correct. The Procurator was not the President. The President was always a Bishop, Metropolitan. But he was a ruling member, representative of the Government within the Church——

Q. So the civil power——

Mr. Arkush: Let him finish. He didn't finish.

Q. Hadn't you finished?

A. I think so.

[fol. 178] Q. Have I interrupted you?

A. You have interrupted me, but I have finished my sentence.

Q. You finished your thought. Well, if you want to amplify that remark——

A. In law, the Procurator was the representative of the State within the Synod and the defender of State's rights within the Church, but in fact he was as representative of the Czar within the Synod. He was a great power and influence upon the decision of this——

Q. Precisely, and the Supreme Church Authority in Russia was subordinate to the power and direction of the Chief Procurator as representative of the Czar, is that right?

A. Yes.

Q. So that to that extent the Russian Church was subordinate to and an instrument of the civil Czarist power? That is substantially correct, is it not?

A. Instrument in a political sense, because, you know, the Church has other fields of activity outside politics and social problems, in education, in missions, and so on.

Q. Well, who appointed the Archbishops of the Foreign Missions?

A. The Czar.

Q. The Czar did not permit the convening of Sobors, did he?

A. He procrastinated for twelve years. The Sobor was expected by the Church and promised by the Government.

Q. But never accomplished?

A. Yes.

Q. And the procrastination lasted from the time of Peter the Great to 1917, didn't it?

A. Yes, since Peter the Great, or before, we had no Sobors.

Q. So that throughout the entire Czarist period from Peter the Great until 1917 there were no Sobors?

A. Yes, it is true.

Q. After the Bolshevik Revolution, was it not among the first principles announced that there was a separation of [fol. 179] Church and State?

A. Yes, it was an edict published in January, 1918.

Q. And you regard that as a liberating change, don't you?

A. No, we must distinguish——

Q. Yes or no, first, then we will distinguish.

A. No.

Q. You don't regard that as a liberating change?

A. No.

Q. That is all.

A. That is all.

Q. Professor, I am interested in the system of ideas which you hold, because you criticised events, and I want to know the basis on which you criticised those events. You remained in Russia after the Revolution from 1917 to 1925. Where were you stationed during those years?

A. In Petrograd and after in Saratov.

Q. How long were you in Petrograd?

A. Three years in Petrograd.

Q. That is from 1917 to 1920 you were in Petrograd?

A. Yes.

Q. From 1917 to 1920 in Petrograd and——

A. Two years in Saratov and then——

Q. Where is Saratov?

A. On the Volga River.

Q. That is in the interior of Russia?

A. Interior.

Q. And after 1922 where were you?

A. I was in Petrograd again.

Q. You returned to Petrograd?

A. Yes.

Q. And you remained there until 1925?

A. Yes.

Q. Then you left in 1925?

A. Yes.

Q. Was your work as professor interrupted during the period that you were in Russia?

A. No.

Q. You were not personally molested, were you?

A. No.

Q. In 1925 did you leave by choice or under some form of compulsion?

A. By choice.

Q. And you were able to take your family with you?

A. Yes.

[fol. 180] Q. Now I take it as a professor and a scholar you believe that such a professor and scholar must, however controversial the issue, be fair, factual, honest, and not distort, give a false impression, or import propaganda? Do you believe in those principles of scholarship?

A. Yes.

Q. And I suppose you will say that you attempt to be guided by them?

A. Guided by?

Q. Guided by those principles?

A. Yes.

Q. In your writings?

A. I hope so.

Q. And in the testimony you gave in this court?

A. Particularly in the court.

Q. Well, do you make a distinction between testimony in court and writings?

A. I make, because——

Q. Wait a minute. Do you make a distinction?

A. Yes, I make.

Q. In other words, you say you are more truthful and accurate in court than you are in your writings?

A. I mean—No.

Q. You are embarrassed, aren't you?

A. Certainly I am embarrassed, because if I every time must be conscious and cautious in my activity, in my research, particularly after the oath, I am obliged to be mostly cautious.

Q. Does it make any difference to a genuine——

A. Yes.

Q. Excuse me. Does it make any difference to a genuine scholar whether he is under oath or not?

A. But for Christians——

Q. Answer me. Does it make any difference, yes or no?

A. No, because religious scholar has a particular duty to be true to his oath, because I have sworn upon the Bible here.

Q. Well, suppose a man doesn't swear upon the Bible, does that privilege him, if he is a professor, to be untrue?

A. Certainly not.

[fol. 181] Q. All right. Now, since you left Russia in

1925 you have expressed your displeasure at the course of events in Russia, both in writing and orally?

A. Yes.

Q. The course of history has displeased you, has it?

A. What?

Q. The course of history in Russia after 1917 has displeased you?

A. Of course, yes.

Q. And you understand that your testimony is being used as a foundation for the argument that, because of alleged conditions in Russia, the group of churches in the United States could declare themselves autonomous or independent? You understand that, don't you?

Mr. Arkush: Just a minute. There is no claim that we claim ourselves independent. Autonomous is the word.

Mr. Adler: All right, whatever word you want.

Q. You understand that, don't you?

A. There is a connection of course between my appreciation of the course of events and the approciation of the course of events in America.

Q. And the blacker you paint the picture in Russia, the more color there will be lent to this claim made by the plaintiff? You understand that, don't you?

A. I refuse to answer because your question presupposes that I am blackening consciously the facts. I try to be true to the facts.

Q. Well, the fact that the blacker the picture in Russia is painted, the more color there will be lent to the plaintiff's claim, is not absent from your mind, is it?

Mr. Arkush: He has answered, your Honor. He says he is trying to be truthful and resents the implication [fol. 182] that he has been coloring facts.

A. Your question implies my unloyalty or my bias, my tendency. I deny it.

Q. Precisely.

A. I deny it.

Q. You did not attend the Sobor of 1923 in Russia, did you?

A. No.

Q. You carried on your work as a professor and you remained substantially in the academic atmosphere, didn't you?

A. Yes.

Q. You didn't travel around the country making observations the way a reporter would, did you?

A. No. It was impossible in Russia at that time.

Q. Well, you didn't?

A. I didn't.

Q. So that your opportunities for observation were limited to the rather narrow circles in which you moved, is that not so?

A. Yes, but not only by the circle, but the absence of free press and free movement in Russia at the time.

Q. The absence of a free press prevented you from getting knowledge of what happened all over Russia, isn't that so?

A. Our knowledge in Russia was limited, of course.

Q. Precisely. And it is upon this limited means of observation that you have purported to paint the picture that you did yesterday?

A. Yes, limited, but it was sufficient, because I had so many friends——

Q. You say it is sufficient, don't you, Professor?

A. Yes, I say it.

Q. In your estimation it is sufficient?

A. In my estimation it is sufficient.

Q. I take it, Professor, that you are wholly impartial in this case?

A. You take it?

Q. I assume you are wholly impartial in this case?

A. You really estimate it?

[fol. 183] Q. I say, is it fair to assume that you are wholly impartial in this case? Just yes or no?

A. What is "impartial"? Objective to the truth, but I took the side in the struggle, I mean, by my conviction. I was anti-Bolshevik and a Church man——

Q. No, I am talking about this case, this action in the courts.

A. Oh, in the court?

Q. Right here, this present action. You are impartial between the plaintiff and the defendants, aren't you?

A. No, as a member of the Church of Theophilus, I wish a certain issue of the trial, of course.

Q. You say you are a member of the Church of Metropolitan Theophilus?

A. Yes, I am.

Q. How long have you been a member of that Church?

A. Since my arrival to America, in 1941.

Q. When did you arrive in America?

A. In 1941.

Q. And you are now teaching in a school supported by Metropolitan Theophilus's group, aren't you?

A. Yes, I am teaching in the Seminary——

Q. And you get paid for this work?

A. Oh, it is so insignificant, that it has no role, no part in my virtue.

Q. You attended the Sobor in 1946 of this group of Metropolitan Theophilus, did you not?

A. Yes, in Cleveland.

Q. So it is fair to say that since you came to this country you have been actively associated with the movement represented by Metropolitan Theophilus?

A. It is true, preserving certainly my freedom of opinion, not following blindly my Metropolitan. We are free in our Church, but certainly I belong to his organization.

[fol. 184] Q. You referred to certain actions occurring from 1917 to 1925 in Russia, and although I don't recall your precise words, the impression I gathered was that the Sobor in 1923 particularly was convened by a revolutionary group, by violence or fraud, and through the instrument of the Government. In substance, that is the impression you sought to convey?

A. In substance it is true. You did not allow me to give you the whole picture.

Q. I understand.

A. But in substance that is it.

The Court: This is our legal procedure, Professor: If there is anything explanatory required or if you wish to amplify anything to make more complete a statement you may do so through Mr. Arkush who will question you, and you can explain anything that is left unexplained.

The Witness: If you allow me to give you the full answer about the Sobor of 1923 I can.

By Mr. Adler:

Q. Now, wait a minute. I asked you whether my summary of your statement was substantially correct. Either it is or it isn't.

A. Yes, it was violent, it was a sense of convictions of some members of this gathering, of this Sobor. I don't deny it.

Q. Did you yourself see any acts of violence in connection with that Sobor?

A. Yes, because——

Q. What acts? How many acts?

A. What?

Q. How many acts of violence did you see?

A. It is impossible to answer how many acts because——

[fol. 185] Q. Was it two or one?

A. Thousands, because throughout Russia they arrested thousands of priests and bishops, in order to give the government to this revolutionary group. That is the answer.

Q. I asked you what you saw and you told me what you heard?

A. I——

Q. Excuse me. Isn't that the fact? You didn't see thousands of arrests, did you?

A. I——

Q. Yes or no, did you see?

A. Nobody could see but——

Q. Precisely. That is right.

A. But I heard and I read.

Q. I say——

A. I read in newspapers, in Soviet newspapers at that time about these trials.

Q. Notwithstanding the lack of freedom of the press, you say you read these things in the press?

A. In the cases when the Government wishes to publish some facts, of course it is published. It was——

Q. All right. You also said that the attitude of the Soviet Government in those years, 1920, 1921, 1922, 1923, and so on, was anti-religious and atheistic, I think you said that in substance, did you?

A. The Government?

Q. Yes.

A. Yes, of course.

Q. In the course of your searches as a student of Church history you have observed that that is not an isolated phenomenon in any revolution, is it, yes or no?

A. There were some religious revolutions too, in England, for instance.

Q. But anti-religious feeling and even atheistic feeling, expressions and actions were a frequent concomitant of a social revolution, haven't you found that so?

A. There was only one social revolution in the world.

[fol. 186] Q. That was the French Revolution?

A. No, Socialist Russia.

The Court: He didn't say Socialist. He said social.

A. Of course, French Revolution, social or what, was not atheistic, but anti-Catholic.

Q. You say the French Revolution did not have a period when it was atheistic?

A. No, no period.

Q. You have answered it. You have said no.

Mr. Arkush: I am not objecting, but it seems to me this is going pretty far afield.

Mr. Adler: Wait a minute.

Q. Don't you recall that the Assembly, the National Assembly in France, shortly after the French Revolution, passed a resolution purporting to abolish God, and that that resolution failed of carrying by one vote? Do you recall that incident?

A. But it failed.

Q. But the resolution was proposed, wasn't it?

A. Officially, atheism was prohibited and punished by death by Robespierre. Robespierre punished the atheists.

Q. I know, but wasn't there a period——

A. And various other people.

Q. (Continuing)—in the French Revolution when they were atheistic?

A. Never was.

Q. Well, now, coming to the Sobor of 1923, have you read the minutes of that Sobor, by the way?

A. 1923?

Q. Yes.

A. Not the minutes but the resolutions.

Q. The resolutions?

A. Yes.

Q. The minutes and resolutions of that Sobor are in evidence. They were offered by Mr. Arkush. You recall, [fol. 187] do you not, that there were about 600 delegates at that Sobor?

A. I don't remember exactly.

Q. Well, the record will show that. There were about 600 delegates.

A. I don't deny it.

Q. And that the minutes of that Sobor were signed by 62 Bishops—do you know that?

A. Yes, by many Bishops.

Q. And that representatives of the American Methodist Church were present at that Sobor?

A. I think so.

Q. And that Bishop Blake addressed that Sobor?

A. (Nodding yes.)

Q. And that a Methodist minister by the name of Hartman was present?

A. Who?

Q. Reverend Hartman was present as a delegate of the Methodist Church at that Sobor?

A. I don't remember. It is possible.

Q. Do you know that Reverend Hartman testified in the course of the case of Kedrovsky vs. Rojdesvensky as to the convening of that Sobor, as to the meetings that were held, the proceedings of the meetings, and the resolutions that were passed? Do you know that?

A. I don't know.

Q. Do you know that Reverend Hartman testified that there was no violence in connection with the calling of that Sobor, that there was no duress, and that the Sobor was called peacefully and the delegates were elected fairly?

A. I don't know that.

Q. You don't know?

Mr. Adler: Now I offer in evidence the testimony of Reverend Hartman which appears at pages 106 to 137

of the record on appeal in Kedrovsky against Rojdesvensky.

Mr. Arkush: I object to that, your Honor.

The Court: Sustained.

[fol. 188] Q. Did you know that a witness by the name of Mr. Hibben testified in substance to the same effect concerning the meeting of that Sobor?

A. Mr. Hibben?

Q. Mr. Hibben (spelling) H-i-b-b-e-n.

A. I did not hear that.

Q. That Sobor of 1923 passed a number of resolutions, did it not?

A. Yes, of course.

Q. Among those resolutions was the principle that the Church and State be separated, was it not?

A. Yes.

Q. Another resolution was that delegates to the convention be limited to speeches of 15 minutes, do you recall that?

A. Maybe. No, I don't remember.

Q. Another was the relics of the Church should be preserved?

A. Yes, sir.

Q. Another was that monasteries be closed?

A. Yes.

Q. Now, isn't it a fact that in other countries monasteries had been closed hundreds of years ago?

A. Not in all of course. In some.

Q. Well, not all. Do you recall the situation in England when Henry VIII closed the monasteries and took over many churches?

A. Yes, I know it.

Q. That was a familiar phenomenon all over the continent hundreds of years before 1923, isn't that so?

A. There were countries who abolished monasticism. There were Protestant countries but in Catholic countries still exists.

Q. Are you sure of that statement?

A. Of course——

Q. Well, in France?

A. In France, yes.

Q. So you want to withdraw that.

A. Yes, but you know that in the last generation the mon-
[fol. 189] asteries were readmitted in France. In fact, there were hundreds of them.

Q. In any event, the closing or opening of monasteries was a legitimate subject of debate and difference of opinion in a Church, isn't that so?

A. The fact that during revolutions monasteries are usually closed don't make this fact legitimate.

Q. No, I say that a resolution to close monasteries is not anti-canonical or revolutionary.

A. Certainly it is Protestant and not Orthodox.

Q. But couldn't a resolution to close monasteries be passed in a conservative Sobor called in accordance with all the requirements of the Orthodox Church?

A. No, I don't think so. Monastic institute is a core of the Orthodox life, the essence.

Q. There were many groups in the Sobor of 1923 representing various elements in the Church?

A. They were very close to another, three Reformed Churches, but not conservative party in the Church.

Q. All right. Prior to 1917, these various reform movements in the Church found no means of expression because there were no Sobors, that is a fact, isn't it?

A. No, they had the means of expression.

Q. What was the means of expression?

A. By press—they published books and magazines.

Q. But after the revolution, in this Sobor, these various reform movements were able to find a forum in the Church, in a Church meeting to express their views, isn't that so?

A. They participated in the first Sobor of the Patriarch, who elected the Patriarch, in 1917. They were in the minority there.

Q. After the Sobor of 1923 didn't many of the parties who were present at that Sobor disappear, like so many
[fol. 190] ephemeral movements in the Church?

A. They were fused into one Synodal Church.

Q. But I mean after the fusing of the Synodal Church, after 1923, and by 1925 didn't all or most of the constituent members of that Sobor dissolve as parties and weren't they absorbed by the Patriarchal Church?

A. Isn't that the fact?

A. Not before the war. They existed separately.

Q. But to what extent did they exist separately?

A. As minority.

Q. Weren't there isolated communities here and there?

A. We have numbers, of course, approximate numbers, that they constituted a third of the parishes.

Q. Well, you haven't produced the data on which that is based, have you?

A. I don't remember.

Q. All right. Now you mentioned something about the persecution of the clergy in Russia during the period you were there from 1918 to 1925. Isn't it a fact that the clergy occupied a privileged position under the Czarist regime?

A. No, it is not very easy to answer your question.

Q. But to some extent?

A. It was very poor, the clergy.

Q. I am talking about the hierarchy, the bishops.

A. The bishops, but not the priests.

Q. The bishops were in a privileged position under the Czarish regime?

A. Yes.

Q. And naturally they had a stake in the preservation of the Czarish regime, didn't they?

A. Not only on material grounds, but on convictions. They were for autocracy.

Q. Whatever the grounds, they had a stake in the perpetuation of the Czarist system, of which they were the bishops?

A. According to their convictions, yes.

[fol. 191] Q. When the Revolution came in 1917, the privileges of these clergymen were suddenly taken away, isn't that so?

A. Yes, but not only this. Of this——

Q. Wait a moment. That is true, their privileges were suddenly taken away?

A. Yes.

Q. And isn't it the fact that for this and perhaps other reasons too a number of clergymen took the side contrary to the Revolution? Isn't that the fact?

A. I don't deny that some of them took part in the counter-Revolution movement.

Q. All right. They fought against the Revolution and joined the Czarist forces.

A. It was a minority, a dwindling minority.

Q. You say dwindling. Upon what authority do do state your position that it was dwindling?

A. Because living in Russia in two cities I saw that most of the clergy remained on their places, not went with the armies to the White Armies, to the South.

Q. Isn't it a fact that Patriarch Tikhon issued an anathema against the Revolution?

A. Yes.

Q. And a great many clergymen followed his directions, didn't they?

A. I think nobody followed him, because this anathema was expressed in such a vague sense that it would be impossible to effectuate it.

Q. It was a sufficient hint for a great number, wasn't it?

(No answer)

Q. You understood what it meant, didn't you, when you saw it?

A. It was not a call to arms for counter-Revolutionary actions.

Q. Well, the point of fact is, isn't it, that a number of the clergymen were in the opposite camp of the Revolution?

A. Yes, a number of the clergymen.

[fol. 192] Q. And a number of these were executed or punished or otherwise put under restraint, isn't that so?

A. But not those who took part in the counter-Revolution, because they were outside the Soviet territory.

Q. Isn't it a fact that those priests and bishops who were punished, were punished not because they were priests but because they were actively engaged in arms against the Revolution?

A. I deny this.

Q. You deny this?

A. Yes.

Q. But you know there is a contrary opinion, don't you?

A. Yes, opinion, yes, exists.

Q. Well, you have an opinion too. Do you set up your opinion as infallible?

A. I——

Q. Excuse me, do you?

A. What?

Q. Do you set up your opinion as infallible?

A. No, of course not.

Q. You admit that others with legitimate grounds may have a contrary opinion to that?

A. Not all opinions have the same grounds.

Q. That's right. Would you accept the opinion of the Patriarch of Moscow?

A. No. He is not free in expressing his own opinion.

Mr. Adler: I move to strike that out. I asked if he accepted the opinion, and he said no, and that is the answer.

The Court: Strike out everything after "no".

Q. Have you seen the book called, "The Truth About Religion in Russia," compiled by the Moscow Patriarchate?

A. Yes.

Q. This book is accepted as an official publication of the official Moscow Patriarchate, isn't it?

A. Yes.

[fol. 193] Q. I take it you disagree violently with the statements made in there?

A. Yes, I disagree. It is untruth.

Q. You say the Patriarch of Moscow published untruths, is that it?

A. Unfortunately——

Q. This is a free country. You can entertain any ideas you want. Don't hesitate.

A. It is against my feeling, but I must.

Q. Truth compels you to make that statement, isn't that right?

A. Yes.

Q. I ask you whether you agree with this statement which appears on page 7, just a short paragraph—by the way, this is a statement by the Patriarch of Moscow: "We dare to say this, in spite of all the imperfection of our administration. Our Russian Church has not been led astray and destroyed by the whirlwind of events. It has kept unsullied its canonical consciousness and at the same time its correct and canonical supreme direction—that is, its part in the life of grace of the Ecumenical Church and its right place in the harmony of the Orthodox Autoce-

phalous Churches." You accept that statement as correct?

A. I accept. I agree with this.

Q. You agree with that statement. There are statements in the book which you say you have read to the effect that any priests who may have been executed or punished were so dealt with not because they were priests but because they were actively engaged in fighting the Civil War. Do you agree with that statement?

A. No.

Q. You do not?

A. I am sorry. I didn't understand the beginning. Some of the priests were executed for the counter-Revolution activity. I agree with that. But the majority not.

Q. All right. Who was executed as a defeated partisan in a Civil War and who was executed as a priest in a [fol. 194] matter which really cannot be determined, isn't that so?

A. Unfortunately, yes, it is difficult.

Q. And an ignorant man's opinion on that point is as good as your learned opinion, isn't that so?

A. But——

Q. Yes or no?

A. When I know or I knew some persons in Russia who died, not for counter-Revolutionary activities, but for loyalty to Church, I must witness. Patriarch Benjamin, the first name, which is considered as a Saint by most of the Russians now, who was the victim of this public trial because of this church valuables, he wishes to extradite these valuables. He went as much as he could for the Government, but in spite of this he was indicted and executed.

Q. You know of that one instance?

A. Yes, I was present at his trial. That is why I mention it. Did I say Patriarch? It is Metropolitan Benjamin.

Q. The Bolshevik Revolution removed any privileges that the clergy had under the Czar?

A. But it is not Bolshevist Revolution. You forget that we had before Bolshevik Revolution, a democratic Revolution.

Q. Yes, the Kerensky Revolution.

A. Yes.

Q. That removed the privileges of the clergy too, didn't it?

A. It began the reform of the clergy.

Q. And the Bolsheviks carried on that reform?

A. No, carried in the opposite sense, because the separation, so-called, in paper, in letters, was in fact a robbing of the Church and depriving of all activities of the Church.

Q. All right. Now when you say that clergymen were persecuted, don't you mean in effect that the withdrawal [fol. 195] of the privileges that they had under the Czar is the persecution you refer to?

A. No.

Q. All right. But you realize, of course, that this book "The Truth About Religion in Russia," makes those assertions, do you not?

A. Yes.

Q. And you agree, too, that this book asserts that the Patriarchal Church in Russia is free from restraint by the Soviet Government?

A. No, it is not free.

Q. I know, but does that book say so?

A. Yes, it says.

Q. And that the Church is at liberty to carry on its work without molestation by the Soviet authorities?

A. The book says.

Q. That is precisely it. And there are other books that say the same thing, aren't there?

A. Very few. In Russia only published three books of this country.

Q. Now, in point of fact, throughout the period that you were in Russia from 1917 to 1925 churches were open for religious worship, weren't they?

A. What period?

Q. 1917 to 1925?

A. Yes, they were, but many of them, more than half, were closed at the beginning of the Revolution.

Q. And they were later reopened, weren't they?

A. No. The number diminished from year to year. Before the Great War, before the last war, it was only one-tenth about of the former number.

Q. And because of the famine in Russia during the Civil

War, the churches were asked to contribute some of their precious valuables, like gold and so on?

A. Yes, it was an official pretext.

Q. You say they confiscated it instead of requesting it?

A. It was confiscated because when Patriarch proposed [fol. 196] to give up willingly they passed by this offer.

Q. In other words, they took what the Patriarch was willing to give willingly, is that it?

A. Yes.

Q. In other words, their manners were bad?

A. Even more than Patriarch because among these valuables there were sacred objects which the believers of the Patriarch preferred to pay for, to redeem for money, but they were not allowed.

Q. All right. Then throughout the period that you were in Russia services were held in the church?

A. Yes.

Q. Church meetings were held?

A. What is church meetings?

Q. Weren't there preachers on the corner, religious preachers on corners?

A. No.

Q. You didn't see that?

A. No.

Q. Looking at the situation after 1925, after you left, naturally, your information from that point on is based on hearsay, that is not from personal knowledge, but from study?

A. It is not identical, not hearsay and press, the press, some publication, Soviet publications.

Q. That is right, from study, not personal observation.

A. Yes, right.

Q. Are you familiar with the course of events in Russia in relation to the Church following 1925? You profess to familiarity——

A. Yes, because I wrote a book.

Q. Isn't it a fact that following 1925 up to the present time the following reforms were instituted in Russia: 1, religious schools were opened—yes or no?

A. I cannot answer yes or no, because they were opened only during the Great War. Before it was only for the Renovated Church.

[fol. 197] Q. All right. But recently religious schools were opened?

A. Of course there was a great change during the war, yes.

Q. And theological seminaries were established?

A. Now, yes.

Q. And religious churches are permitted to publish Bibles and religious tracts and circulate them and so on, isn't that so?

A. No. We must distinguish. No religious tracts as far as I know were distributed in Russia, but, perhaps, about Bibles, I don't know. I heard it, but we had no one copy of the newly printed Bible here.

Q. Isn't it a fact that the propaganda against religion was officially forbidden?

A. Yes.

Q. And that many churches which had been turned into museums have now been restored to their status as churches?

A. Some of them, yes.

Q. And isn't it a fact that the Constitution of 1936 removed any disabilities, civil or otherwise, of the clergy that had heretofore been imposed upon them?

A. It is true, but the Constitution was never realized, never was effectuated. It was never brought into practice.

Q. Isn't it true that the position of the Soviet authorities with respect to the Church is that the Orthodox Church is now subject to the state, has no preferred position, but has the same standing as all Churches within the territory of Russia?

A. Officially, yes.

Q. All right. Isn't it a fact that during 1942, while the curfew was on in Moscow, that midnight services were held at Easter and the curfew was lifted despite the war? Do you know that to be a fact?

A. Yes, but it was all the time, even before the war, the churches were open for worship. But very few——

[fol. 198] Q. Isn't it a fact that in 1945 a decree was passed restoring one-half of the property of the churches which was taken away from them during the early period of the Revolution?

A. What time?

Q. 1945.

A. I don't know about this decree.

Q. You don't know about this decree?

A. No.

Q. And that the ancient shrines were restored to the Church by that same decree?

A. I think partially, yes, they were restored.

Q. After 1925 the Patriarchal Church re-established itself, did it not, you say by 1927? You say the Patriarchal Church re-established itself by 1927?

A. Her central administration. The Patriarch was not elected.

Q. Well, all right. There the Holy Synod continued to function?

A. Yes.

Q. And after Patriarch Tikhon died in 1925, Metropolitan Peter was appointed in his place as locum tenens, isn't that so?

A. Two other people before Peter, but after, Peter.

Q. Within a year later, Metropolitan Sergius was appointed locum tenens?

A. Not locum tenens but substitute for locum tenens, because Peter in exile in Siberia had this title——

Q. So he was acting locum tenens.

A. Acting locum tenens.

Q. And Sergius continued to act as acting locum tenens until 1943, did he not?

A. Yes.

Q. In 1943 a Sobor was held in Russia which elected Sergius as Patriarch, did it not?

A. Not quite exactly, because this Sobor consisted only of some ten Bishops. It was not a true Sobor.

Q. It wasn't a universal Sobor, that is to say, representative from all the branches of the Russian Church all over the world, but it was a Sobor of the Bishops of [fol. 199] Russia?

A. Of a few of the Bishops, yes.

Q. And in 1945, another Sobor was held in Russia?

A. Yes.

Q. That was a universal Sobor, was it not?

A. Yes, I recognize it was.

Q. Representatives from all branches of the Russian

Church were invited to attend that Sobor, isn't that so?

A. Not all branches, but all localities.

Q. Localities. And present at that Sobor were the Patriarchs of other Eastern Churches, like the Patriach of Jersusalem, Patriarch of Alexandria, and so on?

A. Yes.

Q. And that Sobor elected the present Patriarch, Alexi, as Patriarch?

A. Yes.

Q. And he is acting as Patriarch today?

A. Yes.

Q. And all the other Eastern Churches which constitute the entire family of the Orthodox Churches recognize and have been in canonical communion with the Patriarch of Moscow as the head of the Russian Orthodox Church—that is true, is it not?

A. I cannot answer for all the Russian Orthodox Churches, but probably most of them.

Q. Do you know of anyone who does not?

A. My knowledge about the Eastern Church is now limited. I don't know about the Patriarch of Constantinople, for instance. Maybe, yes.

Q. All right. The Soviet Government then permitted the Sobor of 1945, did it not?

A. Yes, of course.

Q. That is something the Czars never did, isn't it?

A. What?

Q. That is something the Czars never permitted, did they?

A. Yes—in fact, yes, there were no Sobors, but Kerensky permitted, yes.

[fol. 200] Q. That is right. It took the Revolution to permit the holding of Sobors in Russia, didn't it?

A. Not Bolshevik Revolution.

Q. First Kerensky and then Bolsheviks carried it out?

A. No, democratic and then fascist Revolution. It is quite different things.

Q. I call your attention to Plaintiff's Exhibit 5-A, the decree of November, 1920 by Patriarch Tikhon.

A. November?

Q. November, 1920. You are familiar with that?

A. The year 1920?

Q. You know what I am talking about?

A. Yes.

Q. I think you said last time that this was an order to regulate merely a temporary situation?

A. Yes.

Q. This was at the time of theCivil War, was it not?

A. Yes.

Q. The Czarist armies were marching from the Crimea up Russia?

A. They were not Czarist armies, but armies of the Russian Republic, of the Democratic Republic.

Q. All right, at least oppositional armies?

A. Yes.

Q. Those who were on the other side of the battle?

A. Yes.

Q. Communications, because of this Civil War, with the Southern part of Russia, were interrupted, and this order was designed to serve as a temporary authority for these churches who could not be communicated with?

A. Yes.

Q. To carry on the Church work until further orders from the Patriarch, isn't that so?

A. Not until further orders.

Q. Well, look at paragraph 10, please.

A. No, this is not in paragraph 10. Please find it.

Q. Well, paragraph 10 says: "All such measures as may be taken in conformity with the present decisions [fol. 201] must upon the re-establishment of the Central Highest Church Authority be submitted to the same for confirmation."

A. Yes.

Q. All right. Now, a certain group of churches organized themselves into what is known as the Karlovitz group, did they not?

A. What?

Q. A certain group of churches——

A. Yes.

Q. All right. And isn't it a fact that in 1922 the Patriarch declared illegal the action of this Karlovitz group of churches?

A. Yes, but not because——

Q. All right. You said yes. And isn't it a fact that

that decree was dated April 22, 1922, signed by Tikhon, by Patriarch Tikhon?

A. I don't remember the date, but——

Q. Well, approximately that time. In other words, the authority that created them dissolved them, is that not so?

A. Yes.

Q. Now, this dissolution of the Karlovitz group was confirmed by another order by the Patriarch on November 10, 1923, that is a fact, is it not?

A. Maybe, yes.

Q. And again on May 9, 1928, a decree was issued, this time I think by Sergius, confirming the invalidity and illegal character of this group of Karlovitz churches?

A. Yes.

Q. So that at least from April 22, 1922, the Karlovitz group of churches had no standing at all in the Orthodox Church?

A. Would you like to hear my answer why?

Q. No, no, first I want the fact. They were dissolved by the Patriarch?

A. Yes.

Q. All right. And again, wasn't there an order entered by the Supreme Church Authority of the Patriarch Church in Russia on December 2, 1934, affirming the illegal character of the action of the Karlovitz churches? Isn't that a fact?

[fol. 202] A. I don't remember.

Q. But approximately that date?

A. I think it is all over, until now, never the Patriarchal Church acknowledgedges this Sobor.

Q. They went further. Not only did they not acknowledge it, but they ordered it dissolved and declared it uncanonical and void?

A. Yes.

Q. During this late war the headquarters of this Karlovitz group of churches was in Yugoslavia, was it not?

A. Yes.

Q. And when the Allies liberated Yugoslavia this Karlovitz group of churches moved over to Germany, when Hitler was in power, isn't that the fact?

A. No, it is not the fact. They were dispersed and came

to Germany, I think, all of them, or most of them, after Hitler's defeat.

Q. Now, wait a minute. Yugoslavia regained its independence before the final collapse of Germany, did it not?

A. Is it so? I don't remember.

Q. Don't you remember?

A. I think it is the last moments of the Hitler——

Q. Well, at any rate, these bishops, these Karlovitz bishops, when Hitler declared war on Russia, favored the Hitler side, didn't they?

A. Some of them, yes, unfortunately yes. Not officially.

Q. And when Yugoslavia was freed, these bishops found a haven and a home in Hitler's Germany, didn't they?

A. No, not Hitler's Germany, under the American protection now.

Q. Isn't it a fact that when Germany invaded Russia one of the bishops of this so-called American Church here sent a telegram to the President of the United States saying he should not send aid to Russia?

A. Yes, I think so.

Q. Now, this group of American churches, which is supposed to be headed by Metropolitan Theophilus, subordi- [fol. 203] nated itself to this Karlovitz group of churches, did it not?

A. Who subordinated?

Q. Metropolitan Theophilus and the American group of churches here, didn't they subordinate themselves to Karlovitz?

A. No, he concluded an agreement with them, but was not subordinate to them.

Q. You say the word "subordinate" is wrong?

A. In my opinion.

Q. I am talking of your opinion.

A. No, in my opinion he was not subordinate.

Q. He was not subordinate?

A. No.

Mr. Arkush: I promised Professor Fedotov that he could get away.

The Court: We will recess until 2:00 o'clock.

(A recess was thereupon taken until 2:00 o'clock P. M.)

AFTERNOON SESSION

2:00 o'clock P. M.

METROPOLITAN BENJAMIN FEDCHENKOFF, residing at 38 Halsey Street, Brooklyn, New York, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Mr. Arkush: Your Honor, his Eminence has indicated he would prefer to be examined in Russian, so I will address my questions in English and they will be interpreted.

(The following testimony was through the Official Russian Interpreter.)

[fol. 204] Direct examination.

By Mr. Arkush:

Q. Your Eminence, you are a member of the Russian Orthodox Church?

A. Yes.

Q. When did you become a member of the clergy?

A. In 1907.

Q. When were you ordained a bishop?

A. 1919.

Q. Was that during the Russian Civil War?

A. Yes, I was in Russia.

Q. Did you take part in the Russian Civil War?

A. Yes.

Q. On which side were you?

A. I was a bishop of White Army.

The Court: What was that? I didn't hear that.

(The answer to the last question was read by the reporter.)

A. (Continuing) Against Red Army.

Q. At that time you were opposed to the Bolshevik Government?

A. Yes.

Q. And you changed later in your convictions?

A. Yes, I changed.

Q. At about what time?

A. 1921-1922.

Q. When the Central Administration of the Patriarchal Church was set up in 1927, did you give the acting locum tenens a pledge of loyalty?

A. No oath was required, but loyalty to the Soviet Government was required, with the understanding that I would not participate in any political fight against the Government. But I was not under the obligation to recognize or defend this regime. I had to be non-political, not having any political affiliations.

Q. When did you come to this country?

A. 1933.

[fol. 205] Q. 1923?

A. 1933.

Q. Did you come as the representative of the Patriarchal Church?

A. Yes.

Q. Since you have been in this country have you given many lectures and addresses throughout the country?

A. Yes.

Q. And in many of those addresses have you expounded the virtues of the Soviet regime?

A. No.

Mr. Adler: I object to that question. I don't see its materiality in the case.

Mr. Arkush: He answered no.

The Court: He answered no.

Q. Do you remember making an address in Chicago a few months ago in which you were reported in the newspapers to have said that the Russian Orthodox Church and Communism are one and the same?

A. This is an absolute lie. I never talked anything like that. But I did not refute that in the papers because there were many such accusations and I didn't refute them.

Q. Did acting locum tenens Sergius demand an obligation of loyalty similar to the one given by you from the other members of the Russian Orthodox clergy abroad?

A. Yes, in the sense of refraining from political fight but not to defend the Soviet Government.

Q. What do you mean by a political fight?

A. To preach in the Church against the Soviet regime,

to talk in other places in that direction, but in the name of the Church, against the Soviet regime.

Q. Well, now, let us take a specific topic. Suppose a Russian Orthodox priest in Chicago were to criticize the Soviet regime for keeping many members of the Russian [fol. 206] Orthodox clergy in the slave labor camps in Russia, would that come within the prohibition of the pledge of loyalty?

Mr. Adler: I object to that question.
The Court: Sustained.

Q. Do you consider any criticism of the Soviet regime as a violation of that pledge?

Mr. Adler: I object.
The Court: Overruled.

A. For the benefit of our Church, our Church on the whole required any absence of criticism. It was for the good of the Church and it was an expression of the Christian attitude to the Government.

Q. And that applies to the Russian clergy abroad?

A. Yes, because the Church is one, and it was necessary for the main center of the Church in Russia, but the Church never demanded that the churches abroad should recognize Communism or anything like that.

Q. When you said it was necessary, you meant it was a necessary condition of being permitted to re-establish the Patriarchal Church Administration, didn't you?

Mr. Adler: I object to that question. There is no evidence that it was ever disestablished.
The Court: May I hear that?
Mr. Adler: I object to the form of the question.

(The pending question was read by the reporter.)

The Court: Objection sustained as to form.
[fol. 207] Mr. Arkush: I didn't hear your Honor's ruling.
The Court: Sustained as to form. It assumes facts.

Q. What was the necessity of asking the clergy abroad to give this pledge of loyalty?

Mr. Adler: I object to the question as irrelevent, immaterial, calling for a conclusion.

The Court: Overruled.

A. Because the Soviet Government suspect the Church of disloyalty against the Government, and the conduct of the churches abroad gave reasons to have suspicions about the conduct of the Church in Russia.

Q. Did that apply to the American Church?

A. Yes, sir.

Q. In what respect?

A. Metropolitan Platon was known in Russia as an opponent to the Soviet Government, and the whole number of facts about the American Church, that the American and the whole number of facts pertaining to the American Church proved that there was an opposition to the Soviet Government, without any doubt.

Q. Is that what is referred to in your Eminence's appointment in the recital reading, "They referred to the decision of his Holy Eminence, the Patriarch, and his Holy Synod, dated January 16, 1924, No. 28, as follows: 'As we have data proving that the Metropolitan of North America has engaged in public acts of counter-Revolution directed against the Soviet power and of disastrous consequences to the Orthodox Church, Metropolitan Platon will be dismissed?' "

[fol. 208] Mr. Arkush: Would you like the stenographer to read the first part of the question back to you?

The Interpreter: Yes.

(The pending question was read by the reporter.)

A. It was written by the Metropolitan Sergius, not by myself, and they probably had reasons to do so.

Q. Do you have personally any knowledge of what is called public acts of counter-Revolution by Metropolitan Platon against the Soviet power?

Mr. Adler: Excuse me. I don't think it matters. It is immaterial whether he has knowledge of these things or not. It is the Higher Church Authorities who decide these questions and not he.

Mr. Arkush: I think the law is very clear that while a civil court will not pass on the canonical legality of a de-

cision by a Church Judicatory, in a civil court you can always go into the question as to whether there was a trial, a fair hearing, or whether there was a judgment. I am going to show that there was never any judgment whatever. The defendant never appeared.

Mr. Adler: There is a declaration of policy by the Chief Church Authorities.

Mr. Arkush: Policy is all right, but that he was tried by a church tribunal has certainly not appeared as yet. I am going to ask Metropolitan Benjamin whether he was nor not.

The Court: Overruled.

[fol. 209] Mr. Arkush: Will the stenographer repeat the question?

A. I remember the question. When I met Platon and asked him whether he is politically active in the Church he told me, "I have stopped it now." Since he had "stopped now," the matter probably stood differently before. And when he separated from the Church, he issued a declaration in which he openly opposes the Soviet regime.

Q. When you say "separated from the Church," you don't mean that he did anything inconsistent or different from what was declared at the Sobor of the American Church held at Detroit in 1924, do you?

A. This Sobor was private, had not been approved by the Highest Church Authority, and in view of this it is not binding to the Church.

Q. Yes, I understand that to be your position, but what I wanted to know was whether you considered Metropolitain Platon's action, which you characterized as "separation", to be anything else but carrying out the decision of the Detroit Sobor?

Mr. Arkush: I will withdraw the question. I think I can simplify it for him.

Your Honor understands that at Detroit in 1924 the delegates of the American parishes adopted resolutions of temporary autonomy which are already in evidence in this case.

The Witness: (In English) I know.

By Mr. Arkush:

Q. You don't mean to imply that Metropolitan Platon went any further than those resolutions permitted? He was simply carrying them out when he made his declaration?

[fol. 210] A. No. He, Metropolitan Platon, told me that in matters of the Church he recognizes the Metropolitan Sergius and then he separated.

Q. These conversations were in 1933 or 1934, were they?

A. I still have documents proving that, a cable that we sent to Metropolitan Sergius.

Mr. Adler: We just want to know the date, not all this. When did these conversations happen?

The Witness: In June, 1933, and when the question came up about the ordination of Reverend Turkevich as the Archbishop Leonty, I suggested to Metropolitan Platon to send a telegram to Metropolitan Sergius, as the head of the Patriarchal Church, that he would permit and bless the ordination into monkhood and his ordination as a bishop. And the Reverend Iliansky, now the Archbishop Makary, he wrote a cable for us and we sent it, the following contents:

"We ask for permission and your blessings to ordain into monkhood the Reverend Turkevich and ordain him as bishop."

And this cable was sent. I still have a copy of it. Consequently, Metropolitan Platon recognized Metropolitan Sergius and asked permission for the ordination.

By Mr. Arkush:

Q. And was it given?

A. And we received it. He gave the following answer: "To begin with, ask Metropolitan Platon to publish in the newspapers that you wrote to me in the cable, that is to say, that he recognizes Metropolitan Sergius as the head of the Church and is not active in politics." Before [fol. 211] sending the cable I showed to Metropolitan Platon whether he does agree, and he agreed. But Metropolitan Platon refused to publish it in the newspapers, what he had told me personally, and about the cable that

was sent, that he was not active in politics and recognizes Metropolitan Sergius, and then he separated from the Church.

Mr. Adler: May the record show that Reverend Turkevich, that the witness referred to, is the bishop who testified on behalf of the plaintiff earlier in this case?

Mr. Arkush: Yes, it is stipulated that Bishop Turkevich is now Archbishop Leonty Turkevich.

Q. Now, did you ever hear of any public acts of counter-Revolution directed against the Soviet power engaged in by Metropolitan Platon, other than writing or speaking in criticism of the Soviet Government?

A. In Russia he conducted an open fight against the Soviet regime and I don't know what was done in America, because I wasn't here.

Q. Well, did you ever hear of any acts other than writing or speaking against the Soviet Government?

A. I was living in Europe. I didn't occupy myself with those questions.

Q. Was Metropolitan Platon given a Church trial before he was dismissed?

A. No, and he wasn't let off before I came here, and he refused to subjugate himself.

Q. To have a Church trial, he would have had to go back to Russia, wouldn't he?

A. That matter was at the time of Patriarch Tikhon. Metropolitan Sergius did not demand that.

[fol. 212] Q. Well, I am referring to the dismissal that is recited in your Eminence's appointment, the one of January 16, 1924. That was in the time of Patriarch Tikhon, was it not?

A. Yes.

Q. I show you Item No. 3, in paragraph 1 of that Ukase which the interpreter can read to you in Russian, or your Eminence can read it.

A. That was done not by the Metropolitan Sergius, but by Patriarch Tikhon.

Mr. Arkush: For the benefit of the Court, I will read it in English:

"Metropolitan Platon will be invited to come to Moscow to put himself at the disposal of the Patriarch."

The Witness: Yes.

Q. So, to have a Church trial he had to go to Moscow to be tried?

A. Of course.

Q. And you say he was a reputed or a noted counter-Revolutionary in Russia?

A. Yes.

Q. And in 1924, assuming that he could have gotten into Russia, he would have been immediately arrested and prosecuted, wouldn't he?

Mr. Adler: Wait a minute.

Mr. Arkush: I ask the Court to take judicial notice of that fact, but——

The Court: Sustained.

Q. You were with the White Army, your Eminence said?

A. Yes.

Q. When the soldiers of the White Army were in the South of Russia and they went to church, the priests prayed for the White Army, didn't they?

A. Yes.

Q. And those priests later, at the end of the Civil War, were prosecuted by the Government for having prayed for [fol. 213] the White Army, weren't they?

Mr. Adler: Just a moment. I object to that question.

Mr. Arkush: All I am trying to show is that if Metropolitan Platon was a noted counter-Revolutionary and if all a man had to do to go to Siberia was to have prayed for the White Army, he certainly would have gone to Siberia, if he hadn't been shot.

Mr. Adler: Under Church law, he didn't have to go to Moscow for a trial. He could have had a trial here, through documents. There have been thousands of trials on documents.

Mr. Arkush: He was ordered to go to Moscow.

Mr. Adler: He could have had the trial through documents. You know that.

Mr. Arkush: Did his Eminence answer the last question?

Mr. Adler: The witness wants to answer the question and since he is a dignitary of the Church no mere lawyer ought to stop him. So if he wants to answer, let him.

(The pending question was read by the reporter.)

A. During the struggle against the Reds the White soldiers prayed in the churches for victory, and I prayed myself.

Mr. Arkush: He didn't answer the question, but it is all right with me.

Q. You are familiar with the ancient canons of the Church, are you not, your Eminence?

A. Sufficiently.

[fol. 214] Q. The canons of the first Council of Constantinople, held 381 A.D., are accepted by the Russian Orthodox Church, are they not?

A. In respect to what?

Q. Trials of bishops.

A. Yes.

Q. I will now read from the sixth canon of the first Council of Constantinople, not all of the canon, but a part of it: "But if any, being neither heretics, nor excommunicated, nor condemned, nor under previous accusation or alleged fault, should declare that they have any ecclesiastical charge against the Bishop, the Holy Synod bids them first lay their charges before all the Bishops of the province, and before them prove the accusations, whatsoever they may be, which they have brought against the Bishop."

Mr. Adler: Your Honor, I object to that portion read by Mr. Arkush because he is not reading the canon. He is reading a commentary, an interpretation of it.

Mr. Arkush: No, it is the canon.

Mr. Adler: No, no.

The Court: Ask him. He is a Church dignitary. He ought to know.

Q. Did I read from the Church canon? I read here. Is this the canon?

Mr. Adler: Your Honor, while the witness is reading, I have the additional objection that it is immaterial whether Platon received a trial or not. I don't see how that is an issue in the case.

(Discussion ensued off the record between the Court and counsel.)

The Court: The objection is overruled.

A. Yes, I read.

[fol. 215] Q. It is the canon?

A. Yes. (In English) Why you ask me?

Q. I am also asking you whether the canons of Carthage are also sometimes called the African Code and are accepted by the Orthodox Church?

A. Yes.

Q. I am reading from Canon 19: "Whatever Bishop is accused, the accuser shall bring the case before the Primates of the province to which the accused belongs and he shall not be suspended from communion by reason of the crime laid to his charge, unless he fails to put in an appearance on the appointed day for arguing his cause before the chosen judges, having been duly summoned by the letters; that is, within the space of one month from the day in which he is found to have received the letters. But should he be able to prove any true necessity which manifestly rendered it impossible for him to appear, he shall have the opportunity of arguing his case within another full month; but after the second month, he shall not communicate until he is acquitted.

"But if he is not willing to come to the Annual General Council so that his cause may there be terminated, he himself shall be judged to have pronounced the sentence of his own condemnation at the time in which he does not communicate, nor shall he communicate either in his own church or Diocese."

Then I am going to ask you——

Mr. Adler: I make the same objection, your Honor.

The Court: Overruled.

Q. (Continuing) —whether the Apostolical Canons are accepted in the Russian Orthodox Church?

A. Yes.

[fol. 216] Q. And I am going to read Canon 74: "If any Bishop has been accused of anything by men worthy of credit, he must be summoned by the Bishops and if he appears and confesses or is convicted, a suitable punishment

must be inflicted upon him. But if when he is summoned he does not attend, let him be summoned a second time, two bishops being sent to him for that purpose,"—and then in some texts this matter is put in square brackets: "But if even then he will not attend, let him be summoned a third time, two Bishops being again sent to him"—close the square brackets—"but if even then he shall disregard the summons and not come, let the Synod pronounce such sentence against him as appears right, that he may not seem to profit by avoiding judgment."

Now, when the Patriarch and his Synod suspended Metropolitan Platon by decree of 1924, No. 28, were they acting under those canons?

A. Yes.

Q. In other words, they took what we lawyers in this country call a default judgment against him?

A. Yes, of course. Permit me to explain it.

Q. Yes.

A. Metropolitan Platon wrote a declaration, and in this declaration he says, first, that he is separating from the Church. That is the first wrong he is doing. But he did things much worse than that. He accused the entire Russian Church of becoming a slave of the Godless Soviet Government and is aiding Godless Government in its fight against God. Any accusation greater than that is impossible.

Q. What was the canonical basis for demanding any pledge of loyalty from any of the Russian Orthodox clergy? [fol. 217] Mr. Adler: Excuse me. There is no evidence there was any pledge of loyalty. It is a question of agitation in Churches against the Government.

Mr. Arkush: When I say "pledge of loyalty," I mean that pledge which his Eminence has testified to.

A. Loyalty is understood as refraining from politics only. And it was necessary for the good of the Church, and who knows better the good of the Church than the Church itself over there? That is all.

Q. But you have said that refraining from politics means refraining from speaking or reading in criticism of the Soviet Government?

Mr. Adler: In churches.

Mr. Arkush: No, he said outside churches also.

A. Both in church and in the name of the Church.

(In English.) For example, you may criticise Soviet Government, but only as private men. If you speak I am lawyer of Russian Church in America, I speak from American Church, it is impossible.

Q. When Bishop Manning signs a letter, as retired Bishop of New York, and publishes it in the New York Times, criticising the Government of Yugoslavia, do you consider that a political act?

Mr. Adler: Excuse me.

The Court: Sustained.

Q. Yet you haven't answered my question. Will you point out to me any provision of the Statutes of 1917-1918 or of the ancient Canons or of the Scriptures which justi- [fol. 218] fied the acting locum tenens to require from the clergy abroad any obligation whatever to refrain from what you call political activity?

A. Yes.

Mr. Adler: I object to the question on the ground it is already answered. The witness says it is a matter of high church policy which is decided by the high church authorities.

Mr. Arkush: That doesn't make it canonical.

The Court: Overruled.

A. Jesus Christ himself said, "Give to God what is God's and to Caesar what is Caesar's." In the Church canons we have nothing to indicate that members of the Church should be active in politics. But, on the contrary, *is* is pointed out that peoples of the Church should not occupy themselves with affairs of the world, that members of the Church should not occupy themselves with affairs of the world.

Q. But there is nothing in the Statutes of 1917 or 1918 on the subject?

A. This matter was not put up.

Q. Let us take up the words by Jesus Christ. Where did Jesus say those words? In what part of the world?

A. In Palestine.

Q. And Palestine was a part of what larger political unit?

Mr. Adler: We can stipulate all those things.

A. Of the Roman Empire.

Q. Jesus also said, "Go to all corners of the world and [fol. 219] preach the Gospel," didn't he?

A. But not politics.

Q. All right. Now, if a Christian missionary at the time of Jesus had gone outside the boundaries of the Roman Empire, do you think that what Jesus said required that missionary to be loyal to the head of the Roman Empire?

Mr. Adler: Just a moment.

The Court: Sustained.

Q. Do you construe the words of Jesus as requiring the citizens of the United States or of Canada to be loyal in any way, shape or manner to the Russian Government?

Mr. Adler: I object to that, your Honor. It doesn't matter what this witness considers.

(Discussion ensued off the record between the Court and counsel.)

Q. Now, this obligation of loyalty or this policy——

Mr. Adler: I object to the use——

The Court: Sustained as to form.

Q. I again want to make sure, your Eminence, that when you talk about political activity you don't mean what we Americans usually call political activity, that is, actively running for office or supporting candidates for office, but merely mean public speaking and writing, is that correct?

A. The answer of the Russian Church is absolutely clear. It cannot prevent any citizen from fulfilling his obliga- [fol. 220] tions, and does not demand it. It only demands refraining from opposing the Soviet Government, refraining, but not subjugating to it. And I am repeating, that is for the good of the Church. It is an obligation of the Church to act in this manner.

Q. When you say "opposing the Soviet Government," you mean criticising it in speeches or writing?

A. As individuals, they may criticise, but they cannot do that in church or in the name of the Church because that would be injurious to the Church. Patriarch Tikhon pointed that out too literally in these words, "Understand at last that your political actions abroad are injurious to the Church, not to the Soviet regime, but to the Church."

Q. That policy which your Eminence has referred to of requiring some kind of an obligation, whatever it was, from the clergy abroad continued continuously from 1927 to the present day, did it not?

A. It demands that a member of the clergy occupy himself with spiritual matters, and nothing more.

Q. No, I asked as to whether the policy of the Central Administration of the Patriarchal Church in this regard was continuous from 1927 to the present time?

A. Yes.

Q. You advised the present Patriarch just prior to his election that an essential condition of reunion between the Mother Church and the American Church was the fullest loyalty to the Soviet power, did you not?

A. (In English) Yes.

Q. And you received a letter from the *locum tennes Alexis*?

A. Yes, I received.

Q. Stating that?

A. I advised.

[fol. 221] Q. And you advised him that you didn't think that the American Church would accept that condition, did you?

A. I wrote him directly that this condition will be difficult to accept by the American Church and asked him to remove this question, to strike out this question.

Q. But, nevertheless, he did not follow your advice, did he?

A. In his Ukase of 1945 he made the demand that the Church refrain from opposition to the Soviet regime.

Mr. Arkush: That is already in evidence, your Honor.

Q. That was rejected by the American Church, the Ukase?

A. (No answer.)

Q. I will ask the question: Was the Ukase, marked Defendants' Exhibit D, the Ukase of February 14, 1945,

which contains this condition, that the American Sobor: "In the name of the American Orthodox Church declares its abstention from political activity against the U.S.S.R. and gives corresponding orders about this to all the parishes"—that Ukase was rejected by the American Church, was it not?

A. Yes. You know.

Q. The Judge doesn't know.

A. But you know.

Q. The Judge doesn't know.

Mr. Adler: There is no evidence that it was ever submitted to them or what action they took about it.

Q. Were you present at the meeting between the Patriarch and his Synod with the delegates, Bishop Alexi of Alaska, and Father Dzvonchik of the American Church?

A. No.

Q. Your Eminence was not present?

A. No.

[fol. 222] Q. But you were in Moscow, were you not?

A. Yes.

Q. And you do know that they appeared, that American bishop and American priest, before the Patriarch and the Holy Synod?

A. They came after the Sobor.

Q. They got there late?

A. Yes, a day late.

Q. After they got there they called on the Patriarch and he was surrounded by the members of the Synod, is that right?

A. I didn't see it and I didn't participate in it.

Q. Well, you have read the reports published both in our papers and in the papers of the Patriarchy, have you not?

A. I wasn't at the time here in America.

Mr. Adler: I will stipulate, if you want me to.

Mr. Arkush: All right.

Mr. Adler: I think it is already in the record.

Mr. Arkush: Part of it is already in.

It is stipulated that Bishop Alexi and Father Dzvonchik, representing the local group of American Churches under Bishop Theophilus, appeared before the Patriarch and the

members of his Synod in Moscow, presented a written report on the condition of the American Church, with a request for autonomy and a few days later received from the Patriarch the Ukase which has been marked Defendants' Exhibit D.

Mr. Adler: I understand that to be the fact, and then these gentlemen brought it back to the United States.

What happened after that?

[fol. 223] Mr. Arkush: Well, I can call Archbishop——

Mr. Adler: Tell me the facts.

Mr. Arkush: It is further stipulated that that Ukase was considered by the members of the Metropolitan Council of the Russian Orthodox Catholic Church in North America, which issued a statement on the Ukase which I will now offer.

Mr. Adler: There are a lot of self-serving declarations in there.

Mr. Arkush: It has to be self-serving. It is the reason we rejected the Ukase and gives the reasons.

Mr. Adler: If you think it is going to help your Honor it is all right, but in my opinion it is immaterial and irrelevant.

The Court: I will take it.

(Received in evidence and marked Plaintiff's Exhibit 16.)

By Mr. Arkush:

Q. Your Eminence, you did claim to be the Archbishop of this Diocese?

A. Yes.

Q. Under the appointment of 1935 which is in evidence?

Mr. Adler: 1934 it is.

A. 1933-34.

Mr. Arkush: It is dated here June 29, 1934.

Mr. Adler: That is right, that is final. The other one was temporary.

Q. Didn't the Statutes of 1917-1918 of the Russian Orthodox Church require that the bishop of a diocese be [fol. 224] elected by the clergy and laity of that Diocese?

A. No, not at all. The laws require, the Sobor of 1917-1918 requires that missions should be appointed.

Q. Don't you know the Russian American Mission became a diocese before the Council of 1917-18?

A. It was a diocese but it was a missionary diocese and the bishops, they are appointed in the missions.

Q. Well, now, I call your attention to the provisions of the Statutes of 1917-18, which are in evidence, providing for the calling of bishops from the dioceses to the Synod, in which the Church is divided into groups, and in the Fifth Group are included the North American Diocese and the Japanese, Chinese, and some other word which evidently is misspelled, missions, so in those Statutes there was a distinction made between the missions and the dioceses, was there not?

A. It is only a difference of terminology, but not of essence.

Q. I also call your attention to Section 16 of the Chapter on Diocesan Bishops in which it says that, "Bishops shall be elected by the clergy and the laity," and then it has three notes. The first note is that, "In extraordinary and exceptional cases, the bishops may be appointed by the Supreme Church Authority." What was there extraordinary or exceptional which prevented your Eminence being elected by the American Church?

Mr. Adler: Just a moment. I object to the form of the question. It assumes a lot of facts which are not so. Mr. Arkush is confused, because the testimony in the case has been that as far as missions or dioceses are concerned, it doesn't matter what, the Archbishop is appointed by [fol. 225] the Supreme Church Authority. The section he refers to refers to the election of bishops of local dioceses within the territoy of Russia.

Mr. Arkush: That is the only section there is.

The Court: Let him explain it. If that is the answer, he will explain it.

Q. I will repeat the question. Was there anything exceptional or extraordinary to prevent your Eminence being elected at a Sobor of the American parishes?

A. I didn't think of it. I didn't know about it. I came to America——

Q. You have answered the question. Now I call your attention to the second note to that Section 16: "In a diocese where a large missionary activity shall be developed and where many non-Russians are living—" —and that is what you call a missionary diocese, isn't it?

A. You can say it this way or that.

Q. Then I am going to continue reading:— "the Diocesan Bishop shall be elected among the candidates who have experience in missionary work." And then it goes on, "Otherwise bishops to such dioceses may be appointed by the Supreme Church authority." Now, didn't practically all of the bishops and a great many of the priests of the American Church have experience in missionary work?

A. I think so, probably.

Q. Was any attempt made to have a meeting, a Sobor of the American Church, for your election?

The Interpreter: Should I say is his Eminence supposed to have made any efforts or did anybody else?

[fol. 226] Q. Well, did anybody call a Sobor for the election of Metropolitan Benjamin?

A. I was appointed by the Patriarch and the Holy Synod.

Q. Your Eminence sent a message to the Cleveland Sobor of 1934, did you not?

A. Yes.

Q. In which you exhorted that Sobor to submit to the Patriarch, is that right?

A. I could not have written it. (In English.) Maybe I don't understand the question, maybe.

Q. Well, many years after Metropolitan Platon died, the Patriarchal Church forgave him, didn't they?

A. Yes, I asked for it.

Q. What has happened since your coming here, your Eminence, as between the Patriarchal Church and the American Church?

Mr. Adler: That is a long order.

The Court: Are we going over all this again?

Mr. Arkush: Well, strike it out.

Q. How many parishes are there in the American Church?

A. About fifty, but I do not consider the number or quantity as a criterion of truth. Jesus Christ has only twelve Apostles and then the entire world became Christian. Quantity doesn't designate truth.

Q. When you say that there are fifty parishes in the American Church, you mean there are fifty parishes which did recognize your Eminence as ruling Bishop, is that right?

A. Yes.

Q. Have you a list of those parishes with you?

A. Yes.

Q. May we have it?

A. I have it home.

Mr. Adler: What materiality would the names of the parishes have?

[fol. 227] Mr. Arkush: Will counsel produce that list before the end of the trial?

Mr. Adler: I have never seen it and don't know a thing about it. I don't know what it has to do with the case.

Mr. Arkush: I would like to have it produced. In the first place, I think the estimate is somewhat wild, and I think it has some materiality.

Q. Will you produce that? Will you let us have that? Give it to your lawyer.

A. (In English) When to bring it?

Q. As soon as you can.

A. All right.

Q. It is true, is it not, that the parishes, the Russian Orthodox parishes in the United States, Canada and Alaska did not generally accept your Eminence as Ruling Bishop?

A. It does not mean that the parishes didn't recognize me. It was due to Metropolitan Platon and those close to him.

Q. And after the death of Metropolitan Platon the same condition continued, did it not?

A. Yes, because his successors, priests, bishops, continued the same attitude. They could have acted entirely differently, but that it is so is proved by the Sobor in Cleveland in 1946, because during that Sobor the majority of the clergy and the laymen demanded the recognition of the Patriarch in opposition to the Archbishops.

Q. Your Eminence, as the vote was secret, I don't know how you know who voted for what, but I won't question you on that. Have you seen the telegram that was sent by Metropolitan Theophilus after the Cleveland Sobor to the Patriarch?

[fol. 228] Mr. Adler: It doesn't matter. If you say it was sent, that is all right. I don't know that the materiality of it is. But it is part of the general picture and if the Judge feels it will be of help, put it in.

Mr. Arkush: I offer a copy of a telegram sent January 21, 1947, by Metropolitan Theophilus to the Patriarch.

Mr. Adler: Offer all three together.

Mr. Arkush: Yes.

I offer an English translation of a cablegram received in Russian under date of January 25, 1947, from the Patriarch in reply to the earlier message.

Mr. Adler: That is subject to translation corrections.

Mr. Arkush: And I offer a telegram sent in English on January 31, 1947, replying on the part of Metropolitan Theophilus to the cablegram from the Patriarch.

I think your Honor has seen all of this.

(Received in evidence and marked Plaintiff's Exhibits 17, 17A and 17B, respectively.)

By Mr. Arkush:

Q. Who is Metropolitan Gregory of Leningrad and Stalingrad?

Mr. Adler: I will concede that he is the representative of the Patriarch of Moscow, and he came to this country, was it a month or two ago, with a view to negotiating with the representatives of this group of American churches to see whether a basis of adjustment of their re- [fol. 229] spective differences could be had, and that negotiations have been carried on between the parties.

Mr. Arkush: And he has full power?

Mr. Adler: I understand he has full power to work out an arrangement. Whether ultimately, before it is actually signed, he has to submit it to the Patriarch I don't know, but he has sufficient power to formulate or come to an understanding with this group as to what the proper relationship should be.

Mr. Arkush: I now offer, your Honor, a resolution of the Metropolitan Council of the American Church, giving its definition of the autonomy that was voted at the Cleveland Sobor of 1946, English and Russian texts of which were delivered by Metropolitan Gregory.

Mr. Adler: I may have seen this or not. I don't know. I don't know what the contents of them are. I think they are negotiations. Whether the parties would want them published or not I really don't know. Ultimately I don't think it matters what people say in the course of coming to an understanding.

The Court: What have these negotiations to do with the issues in this case?

Mr. Adler: I don't know.

Mr. Arkush: I think there is a rather important statement in here. In response to that resolution which was handed to Metropolitan——

The Court: What is the date of that resolution?

[fol. 230] Mr. Arkush: It is not dated, but it is referred to in this response as of August 7th.

Mr. Adler: Of this year?

Mr. Arkush: Of this year. In response to that Metropolitan Gregory wrote a letter in which he stated, and he is the authorized representative of the Patriarch, "His Beautitude, the Patriarch, is in agreement with the resolution of 1946 Cleveland Sobor, that the periodical American Church Sobore"——

Mr. Adler: Will you stop here a moment?

Mr. Arkush is doing the very thing I want to avoid doing. The whole issue is whether these things can be published or put on the record, negotiations between the parties. I have no objection to the Judge seeing it. Whether it should be made a public record is another matter.

The Court: These are negotiations to settle this pending lawsuit?

Mr. Adler: No, sir, this lawsuit——

The Court: No. Does it involve the settlement of this lawsuit?

Mr. Arkush: The lawsuit isn't mentioned.

The Court: If the difficulties are settled, the lawsuit would be settled.

Mr. Arkush: They would. But that was not the subject of the negotiations. They are statements of position, and I think the Judge is entitled to know what the Patriarch's position in regard to that Cleveland Sobor is. He elaborates what he says in his telegram. That is the point. However, I don't press it.

[fol. 231] Mr. Adler: I don't think you should, because it may be unfair to both parties to publicly reveal what they passed to each other in confidence.

Mr. Arkush: I have no further questions.

Cross-examination.

By Mr. Adler:

Q. The Russian Church is governed by the canons of the first seven Ecumenical Councils, is it not?

A. Yes.

Q. And, in addition, the Russian Church is also governed by a number of rules and usages and customs which have developed over hundreds of years?

A. Yes.

Q. With respect to the authority of the Supreme Church Authorities over a bishop, isn't it a fact that the Supreme Church Authorities have a right to call a bishop back to report to the Supreme Church Authorities, or suspend him, or take any action with respect to him that they want?

A. Yes.

Q. And that may be done without a trial?

A. In extraordinary cases.

Q. In other words, a bishop may be suspended and told not to function until further order of the Patriarch?

A. And until trial.

Q. But in the meantime until the trial——

A. As a preventive measure.

Q. That is right. Then the time and method of trial is a matter that is determined by the Patriarch and the usages of the Church, is it not?

A. Yes.

Q. Is it not customary in the Russian Church, and for that matter, in other Orthodox Churches, that trials be

had on documents, on written depositions and statements?
[fol. 232] A. And that can be the case, too.

Q. It is not necessary to have an actual trial where the accused appears in person before a tribunal?

A. If there is written proof, written proof is enough without trial, particularly under extraordinary circumstances.

Q. Now, the Supreme Church Authority of the Russian Church lays down the policy of the Church and what it regards as good or bad, inimical to its interests, does it not?

A. Yes, that is an obligation of any higher authority.

Q. And when the policy of a Church is laid down by the Supreme Church Authorities, on any subject, is it the duty of every subordinate branch of that Church and every member of that Church to abide by the policy as laid down by the Supreme Church Authority?

A. Yes, if they do not want to be revolutionaries against the Church.

Q. If the Supreme Church Authority takes a position on any question affecting the Church, may any one bishop or group of bishops oppose that policy?

A. According to the Church Law, they have not the right. They have to subjugate themselves.

Q. Subject themselves?

A. Subject themselves.

Q. With respect to the trial of Metropolitan Platon, was it necessary for him to go to Moscow for a trial or could he have had a trial of his case on depositions and documents?

A. Absolutely not because the fact of his separation was known, also the fact of his declaration.

Q. I am not quite sure you answered my question. I want to know whether Metropolitan Platon, if he had wished a trial, could have had a trial on documents and stayed in the United States, and have had the Supreme [fol. 233] Church Authority in Russia decide on any documents that he wished to submit. It could have been done if Platon had wanted it, isn't that so?

A. Yes.

Q. In your appointment dated June 29, 1934, as Archbishop of the American Archdiocese, there is reference

to a decree of the Patriarch and the Holy Synod declaring schismatic the religious group organized around Metropolitan Platon. Under the rules of the Russian Church did the Supreme Church Authorities in Russia have the power to make that declaration?

A. Yes.

Q. And upon such declaration was it the duty and obligation of every bishop and clergyman of the Russian Church to abide by that declaration and not oppose it?

A. If they don't want to, nobody can compel them.

Q. Yes. But canonically it is not permissible?

A. They have to, according to the canons.

Q. Reference has been made to Section 16 of the Rules of the Sobor of 1917 concerning the election of certain bishops of certain dioceses, and reference has also been made to the provision that "Bishops to the Foreign Missions shall be appointed by the Sacred Synod"—do you recall that?

A. Yes.

Q. Now, isn't it a fact that Bishops of Foreign Missions or Foreign Dioceses or Foreign Archdioceses, that is, Missions, Dioceses or Archdioceses outside of Russia are to appointed, not elected, appointed by the Supreme Church Authorities?

A. Yes.

Q. That is the rule?

A. Yes.

Q. And it always has been the rule?

A. That was the rule all the time since the foundation of the American Church.

[fol. 234] Q. That is right. Before 1917 and after 1917, isn't that so?

A. Yes.

Q. Now, the references in Section 16 of these enactments of the Sobor of 1917, relating to the election of bishops, does not that Section refer to the election of bishops of local dioceses within the Russian territory and not to Foreign Archdioceses or Missions?

A. In all Missions and Churches Abroad, the bishops were appointed.

Q. I understand. But with respect to dioceses within Russia?

A. They were elected.

Q. But even when a bishop was elected in a diocese within Russia, wasn't the election of that bishop nevertheless subject to the confirmation of the Supreme Church Authorities?

A. The elections had to be confirmed and prior to the elections the candidates must have been approved by the Highest Church Authority.

Q. That is right. And, referring to Section 2 of Part IV of the Enactments of the Sobor of 1917, entitled: "Enactments concerning the categories of affairs within the jurisdiction of the organs of the Supreme Church Administration, December 8, 1919," Section 2 provides: "Confirmation of bishops elected to the diocese in their office, their appointment in proper cases, and their retirement" —did you understand me? That was within the power of the Supreme Church Authorities specifically provided in the Sobor of 1917, was it not?

A. And according to the general laws of the Church.

Q. That is right. In other words, in the American Archdiocese, if a number of bishops, one or fifty, in the American Archdiocese got together and elected, purported to elect an Archbishop of the American Archdiocese without [fol. 235] confirmation by the Supreme Church Authorities in Russia, would such an Archbishop have any standing under the rules and usages of the Russian Church?

A. He would be declared illegal.

Q. Yes. Now, it is the practice and custom under the rules of the Russian Church that the Archbishop appointed by the Supreme Church Authorities in Russia occupy and use Saint Nicholas Cathedral as his residence and place of worship, is it not?

A. Yes.

Q. In October, 1945, did you take possession of Saint Nicholas Cathedral?

A. Yes.

Q. And did you hold religious services in Saint Nicholas Cathedral?

A. Yes.

Q. And did you sleep there from time to time?

A. Yes.

Q. And you occupied that Saint Nicholas Cathedral as Archbishop of the Archdiocese?

A. Yes.

Q. Did you, after October, 1945, publish this stationery relating to your office?

A. Yes.

Q. As Archbishop?

A. Yes.

Mr. Adler: I offer it in evidence.

(Received in evidence and marked Defendants' Exhibit G.)

Q. When Metropolitan Sergius became the Patriarch of Moscow in 1946, was it?

A. 1943.

Mr. Arkush: Sergius died in 1944.

Q. In 1945, did Archbishop Alexis——

A. Not Archbishop, Metropolitan.

Q. All right, Metropolitan Alexis—come from the Patriarch at Moscow to the United States?

A. The Ambassador of Patriarch you are talking about.

[fol. 236] Q. The ambassador, yes.

A. Yes, Ambassador of the Patriarch.

Q. He came to the United States as an Ambassador from the Patriarch to the United States in 1945?

A. Yes, September.

Q. How long did he stay in this country?

A. Six months.

Q. During that period while he was in the City of New York did he live and hold services in Saint Nicholas Cahedral?

A. Yes.

Q. You possessed, occupied and used Saint Nicholas Cathedral from about October, 1945, until——

A. 6th of June, 1947.

Q. I say you occupied the Cathedral until about June 6, 1947, when you left pursuant to a stipulation entered into on applications for adjournment of this case—that is a fact, is it not?

A. Yes.

Mr. Adler: All right.

I would just like to call your Honor's attention to the fact that in Plaintiff's Exhibit 16, I call your Honor's attention to a statement on page 6, reading as follows:

"The Council of Bishops find it necessary to recommend to the clergy of the Metropolitanate for the general welfare not to touch upon political questions and not to make any public speeches on the subject, especially from the pulpit", the subject being referred to as political activities against the U.S.S.R. That is a statement issued by the head of the group of churches in the United States.

Re-direct examination.

By Mr. Arkush:

Q. Your Eminence, how did you get possession of the 97th Street Cathedral in 1945?

[fol. 237] A. Father Kedrovsky, who formerly had recognized the Renovated Church, now recognized the Patriarchal Church, and surrendered the Cathedral to the Patriarchal Church. It was done by Archbishop Alexis, Ambassador of the Patriarch.

Q. Now, Kedroff, John Kedroff, claimed to be a priest of the Russian Orthodox Church before he surrendered the Cathedral to you, didn't he?

[fol. 238] Mr. Adler: As I say, I am willing to stipulate that the defendant Kedroff claimed to be a priest by virtue of a prior ordination of another bishop.

Mr. Arkush: He also claimed possession of the premises in question in this action, under one Christopher Contogeorge, who he claimed in an affidavit in this action to be the Archbishop of the Russian Orthodox Church in America.

Mr. Adler: All right he made that claim in an affidavit and then Metropolitan Benjamin and the Ambassador, Archbishop Alexis, the Ambassador from the Patriarchal Church in Moscow, came to the United States and he said, "Well, I made a mistake. I recognize you as the Chief Church Authority. Ordain me all over again." They did, and he gave them the Cathedral. That is the fact.

By Mr. Arkush:

Q. You said, your Eminence, that Platon could have been tried in the United States. He wouldn't have received [fol. 239] a trial by his fellow bishops as required by the canons if he had been tried in the United States, would he?

A. They did not have a sufficient number of Bishops here.

Q. To try him in the United States?

A. Yes, and we were not the Supreme Church Authority.

[fol. 240] New York, N. Y., October 16, 1947,

TRIAL RESUMED

10:00 A. M.

GEORGE P. FEDOTOV, resumed the stand and testified further as follows:

Cross-examination.

By Mr. Adler (Continued):

Q. I think, Professor, we were talking about the Karlovitz Synod when we adjourned last time?

A. Yes.

Q. Now, the foundation for the organization or the authority for the organization of this Karlovitz Synod was this order of Patriarch Tikhon dated November 20, 1920, was it not?

A. Yes.

Q. Is there any other authorization for the creation of this Karlovitz Synod?

A. No, so far as I know.

Q. Very well. I think we agreed that this organization of November 20, 1920, was a temporary one because of the interruption of communications, and designed to terminate once communications, with the Central Church Authorities was established, is that right?

A. It is the text of this document.

Q. It purports to say that?

A. No, it is different.

Q. How different?

A. The Synod itself could consider its power in different terms than this document. It is different.

Q. But wasn't the reason for the issuance of this order of 1920 the fact that there were no communications between Patriarch Tikhon and the bishops outside of Russia because of the Civil War? Isn't that the fact, just yes or no?

[fol. 241] A. I refuse to answer in so simple form, yes or no, because we must distinguish between yes and no. There is truth practically always.

Q. Please make it brief and accurate.

A. Yes, brief. I don't defend this Synod, don't defend. but I suppose that the members of the Synod had other grounds of reason besides——

Q. I am not interested in psycho-analyzing the minds of these bishops. I am interested in authority which was given by the Patriarch of Moscow. That is all I am interested in.

A. Yes. There is no doubt that as far as the Patriarch of Moscow goes this is the only authority he gave to the Karlovitz Bishops.

Q. Is that right?

A. Yes.

Q. And this authority was given because of the failure or the interruption of communications between the Patriarch and the bishops outside of Russia because of the Civil War, isn't that the fact? You can answer yes or no, can't you?

A. No. It can be interpreted in different ways.

Q. All right. Is that a legitimate interpretation?

A. I think there is a legitimate——

Q. Well.

A. No, not yours. The legitimate interpretation that the break of communications means not only the postal break, you know, but it can be a juridical, social, political and moral break, so in the opinion of the Synod and of my own——

Q. And your own opinion?

A. And my own, in this opinion I say the political pressure upon Patriarch, the confinement of the Patriarch,

and so on, deprived the Patriarch of a true means of communication.

Q. All right: You say that is a permissible interpretation and that is more agreeable to your scheme of things, is that right?

A. Yes.

[fol. 242] Q. All right. Now this order of 1920 also says that all actions by the Karlovitz Synod——

Mr. Arkush: No, it says no such thing.

Q. (Continuing) —"all measures as may be taken in conformity with the present decisions must upon the reestablishment of the Central Highest Church Authority be submitted to the same for confirmation." That is the fact, is it not?

A. Yes.

Q. All right. And the Karlovitz Bishops never submitted to the Central Church Authority in Russia the confirmation of their acts, did they?

A. Never.

Q. They never did?

A. Never did.

Q. Isn't it a fact that Patriarch Tikhon by an order dated April 22, 1922, dissolved the Karlovitz Synod, declared their acts anti-canonical and prohibited them from functioning, yes or no?

A. Yes.

Q. And isn't it a fact that on November 10, 1923, a similar decree issued by Patriarch Tikhon gave the same orders and directions?

A. Probably yes. I don't remember the date, but it is the fact.

Q. You don't remember——

Mr. Arkush: I will concede——

Mr. Adler: No, no.

Q. You wrote a book called "The Russian Church Since The Revolution", did you not?

A. Yes, 20 years ago, so I don't remember all the dates in my book.

Q. Well, it wasn't an issue of a date, was it? It was an issue of substance, wasn't it?

A. Yes. I don't contradict. You are right in your substance.

[fol. 243] Q. Yes, but didn't you indicate there was some doubt about it?

Mr. Arkush: I object. We are wasting time. He doesn't remember the exact date. I am willing to concede the date. Why waste time on it?

Mr. Adler: It isn't an issue of dates. It is an issue of substance and my idea was that the witness was hedging about the validity of that order.

The Witness: I have acknowledged already.

Q. There is no doubt about it, is there?

A. In my mind.

Q. And didn't you so state in your book?

Mr. Arkush: Show him the book.

Q. Didn't you so state in your book, that there is no doubt about the validity of the order of the Patriarch of November 1923 dissolving that Karlovitz group?

A. You say "validity". It is a different question. It is a different problem, validity, or the fact of this issue. I——

Q. I am talking about the fact of the issuance.

A. The fact of the issuance, without doubt.

Q. Without doubt?

A. Yes.

Q. And isn't it a fact that these two orders of April 22, 1922, and November 10, 1923, recalled the order of November 20, 1920?

A. Yes.

Q. And subsequently in 1928, May 9, 1928, and on June 22nd, 1934, or thereabouts, subsequent orders by the Chief Church Authorities in Russia similarly affirmed these nullifying orders issued by Patriarch Tikhon, isn't that the fact?

A. I could not follow your dates. You mean Sergius?

[fol. 244] Q. Sergius.

A. Yes.

Q. So that at least on four occasions, Patriarch Tikhon on two occasions, and Patriarch Sergius on two other oc-

casions, declared the acts of the Karlovitz Bishops null and void and prohibited them from acting?

A. Yes, that is the fact.

Q. Notwithstanding that these Karlovitz Bishops carried on anyway, isn't that so?

A. What?

Q. Notwithstanding these prohibiting and nullifying orders, these Karlovitz Bishops carried on anyway?

A. Yes.

Q. When these Karlovitz Bishops organized their Synod—what year was it, by the way, that it was organized?

A. What?

Q. What year was that Karlovitz Synod organized?

A. What?

Q. What year? Was it around 1920 or 1921?

A. 1921.

Q. How many bishops were in that Synod?

A. How——

Q. How many bishops?

A. I don't remember. More than ten, between ten and——

Q. Weren't there only four?

Mr. Arkush: Do you want the fact?

Mr. Adler: No, I want what the witness knows.

A. No, I don't know. I think it is about ten or twelve.

Q. Very well. These Karlovitz Bishops established themselves in Yugoslavia, isn't that so?

A. Yes.

Q. And in the course of events when the Allies liberated Serbia, the Karlovitz group moved to Germany, did it not?

A. We have spoken about it.

Q. But they did move. I didn't ask you when. I said [fol. 245] they did move into Germany?

A. But after the fall of Germany. After the fall.

Q. You still insist it was after the fall of Germany, or are you guessing at that date?

A. I am guessing. I am not sure.

Q. You don't want to guess, do you, a historian like you doesn't want to guess on a material fact?

A. Certainly. I am not writing a book. I answer——

Q. You are giving testimony. Isn't that the equivalent of writing a book?

A. (No answer.)

Q. Anyway, they went to Germany, leaving the date open, isn't that so?

A. Some of them went to Germany, some of them to Switzerland and——

Q. But the Synod, the organization?

A. Yes, now it is in Germany, yes.

Q. And they left Yugoslavia and went into Germany in front of the liberating Allied Armies, didn't they?

A. In front?

Q. Before them. As the liberating Allies liberated Yugoslavia they went into Germany, isn't that the fact?

A. I don't know. Perhaps it is not the fact.

Q. You don't know. That is enough. Now isn't it a fact that during the Civil War in Russia, in 1920 and 1921 and 1922, these Karlovitz Bishops publicly favored the restoration of the Czar?

A. Not during the Civil War. It was——

Q. I can't hear you.

A. Yes, it was in Yugoslavia.

Q. "Yes", is enough.

A. 1921, yes.

Q. They publicly favored the restoration of the Czar?

A. Yes.

Q. Then when Hitler attacked Russia in 1941, these Karlovitz Bishops publicly announced their stand for Hit-
[fol. 246] ler, didn't they?

A. No, not publicly.

Q. But privately?

A. Some of them privately were compromised, yes.

Q. They played with Hitler?

A. Not they. Some of them.

Q. Some of the Synod?

A. Yes, some of the members of the Synod.

Q. And isn't it a fact that orders were given that in the churches under the jurisdiction of these Karlovitz Bishops that a prayer should be uttered for Hitler?

A. Should be what?

Q. I withdraw that question. Is it not one of the usages of the Orthodox Church, that in services, in prayers, a

prayer be issued for the welfare of the Chief Ecclesiastical Authorities of the Church and the Civil Authority too? Isn't that one of the practices?

A. You mean for the head of the Government? Yes, in every country.

Q. That is right. For example, in the United States the Orthodox Churches pray for the welfare of their Chief Authority?

A. President Truman.

Q. Excuse me. Wait a minute. In case of churches acknowledging the authority of the Patriarch of Moscow, they pray for the welfare of the Patriarch of Moscow, and the President of the United States, isn't that customary?

A. Yes.

Q. And during the lifetime of President Roosevelt they prayed for his welfare, isn't that so?

A. Yes.

Q. That is one of the customs and practices of the Church?

A. (Nodding yes.)

Q. Isn't it a fact that the churches, such as they were, under the authority of the Karlovitz Bishops prayed for the welfare of Hitler?

A. In Germany.

[fol. 247] Q. Yes or no.

A. In Germany, yes, but not in Switzerland.

Q. I am talking about Yugoslavia.

A. I don't know about Yugoslavia.

Q. You don't know that?

A. Probably for the head of the Serbian Government, not for Hitler.

Q. No, I am talking about Hitler.

A. No, I don't know.

Q. You don't know?

A. No.

Q. You wouldn't deny it, would you?

A. I wouldn't deny it because I don't know.

Q. I have before me a pastoral letter of Patriarch Sergius dated March 28, 1942, which appears in "The Truth About Religion in Russia," which you indicated you had read. Now I have this single sentence, "The European

Karlovatsk''—that is the same thing as Karlovitz, the one we are talking about?

A. Yes.

Q. "The European Karlovatsk separatists have completely entered Hitler's services. They pray for him in their churches." Is that——

A. If the sentence is true, it relates to the churches in Germany. I don't know.

Q. It doesn't purport to say Germany, does it?

A. He doesn't say either that it was Yugoslavia.

Q. Do you dispute the statement of the Patriarch?

A. Why not?

Q. Why not? I am asking you. Why do you?

A. I don't dispute. In this statement there is nothing said about Yugoslavia. It is not said that all the members of the Karlovitz——

The Court: This is all argumentative. Let us get to something concrete, please.

Mr. Adler: One more question on this and I will leave it. [fols. 248-249] The Witness: But it is all to nothing, because I disagree with politics of these Karlovitz bishops.

By Mr. Adler:

Q. Now I show you an article appearing in a magazine called "The Living Church" in the issue of April 27, 1947, entitled, "America——"

Mr. Arkush: Don't read from it because I am going to object.

Mr. Adler: I am not going to read.

Q. Entitled "Karlovitsi and Moscow,"

Mr. Arkush: Do you want that in evidence?

Mr. Adler: Just a portion of it.

Mr. Arkush: If anything goes in, put the whole thing in, to make speed.

Q. Written by Ralph Montgomery Arkush, the attorney for the plaintiff in this case, and I call your attention to this portion of the article——

Mr. Arkush: Let us get it in first

Mr. Adler: All right. I offer it in evidence.

(Received in evidence and marked Defendants' Exhibit H, consisting of pages 15 and 16.)

[fol. 250] By Mr. Adler:

Q. As I say, by the time of the end of this war, by 1947, that Karlovitz Synod had ceased to exist for practical purposes, isn't that the fact?

A. But there is a Synod in Germany now.

Q. It is a paper organization. They have no parishes, no jurisdiction, no churches, have they?

A. They have some parishes.

Q. How many?

A. I don't know.

Q. Two, three, four, no more than that?

A. Perhaps some dozens, because they have an organization in the Camps of D. P.'s in Germany.

[fol. 251] Q. In other words, they have some adherents in the displaced persons' camps?

A. Yes, mostly.

Q. But outside of those have they any other jurisdiction, this Karlovitz group?

A. There are some churches in France, in Italy, in Switzerland, and in this country too, but very few, relatively very few.

Mr. Arkush: South America, China, Japan.

Q. Well, didn't you say somewhere in writing that the Karlovitz Synod had ceased to exist?

A. I don't think so.

Q. You don't think so. All right. Now, let us turn to the United States. You are aware, are you not, that by a decree of August 16, 1933——

A. 16th?

Q. August 16th, 1933.

A. 1933?

Q. I don't hold you to the date. I have that date. You don't have to agree with me on the specific date. A decree was issued by the Supreme Church Authority in Russia under Patriarch Sergius declaring anti-canonical the declaration of autonomy of the group of American churches, declaring that to be a violation of the discipline of the

Church and putting Metropolitan Platon under prohibition from performing divine services?

A. I was not in America that time, did not read this document. I heard of it. So I am not a witness in this case. Probably you are right.

Q. But on the direct examination you were very free to testify as to a lot of things to which you were not a witness, but which you discovered in the course of your searches.

A. Yes, yes.

Mr. Arkush: Not, your Honor, as to the American Church.

[fol. 252] Q. As a historian, didn't you feel it your duty to acquaint yourself with documents relating to the subject of Russian Church history?

A. I did not write a book about American Church.

Q. You didn't?

A. No.

Q. Whether you wrote a book or not, didn't you familiarize yourself with the course of events of the Church in the United States?

A. Not in exact terms.

Q. But did you, in exact terms, become familiar with that document?

A. I heard of it.

Mr. Arkush: To save time, I will concede whatever is in the document. What is the use of badgering the witness about it? He wasn't produced here as a witness on the American Church.

The Court: It seems to me that nine-tenths of the evidence adduced so far on both sides is completely foreign to the issues in this case. I can't understand. After all, there is no jury in this case and you gentlemen seem to be proceeding on the theory that the political tincture of the respective factions has something to do with their right to occupy this Cathedral. I am sure that you are not soberly advancing the idea that because one faction may be Communist or anti-Communist, or one faction may be Fascist or anti-Fascist, it has anything to do with the right to occupy the Cathedral.

Mr. Arkush: I certainly haven't advanced any such idea.

The Court: I dare say 75% of the evidence has been directed towards that proposition.

[fol. 253] Mr. Arkush: Our endeavor was to show that the Patriarchal Church was cut off from communication with America and therefore we came under the jurisdiction of the ukase to declare our autonomy.

The Court: That was twenty years ago.

Mr. Adler: I will cut that short.

By Mr. Adler:

Q. After Bishop Theophilus succeeded Bishop Platon, you are aware, are you not, that the Patriarch issued a similar decree nullifying the action of the so-called autonomous group in the United States and declaring it anti-canonical, and I am referring to Defendants' Exhibit C.

Mr. Arkush: Now I object. He is going right back to the American Church. The witness was not produced to testify as to the American Church, and didn't testify as to the American Church.

The Court: Let him state that.

Q. Are you familiar with that document?

A. I heard it.

Q. In 1937 the so-called American Church placed itself under the jurisdiction and authority of the Karlovitz group, did it not?

A. No.

Q. The answer is no?

A. I cannot answer yes or no. It is——

Q. It is a mixture of yes and no, is it?

A. Yes, sir.

Q. How much of it is no?

Mr. Arkush: Let the witness answer.

Mr. Adler: All right.

The Witness: If you will let me answer.

[fol. 254] Q. Please explain, but try to be brief and accurate.

A. Metropolitan Theophilus, as well as some heads of these Church factions agreed in an official document to

organize a common Synod consisting of four Metropolitans, China, West Europe, Karlovitsi and America, Karlovitsi in the sense of the Yugoslavia and Balkan regions. So in this case Theophilus acceded to this organization as a member of it, but in practice I think he ruled autonomously in America. That is the point. When I disagree with my Metropolitan, I deeply regret the fact of his entering this organization, but he considered himself not as a subordinate, and we in America did not consider us as subordinate to this Synod.

Q. Before I forget it, what is the foundation or authority for the creation of the so-called Metropolitan District in the United States? Is it that same order of November 20, 1920?

Mr. Arkush: Same objection. He wasn't produced as a witness to that.

A. The American Church existed before it as a more or less——

Q. I know, but the autonomy didn't exist before 1924, did it?

A. In fact, it existed since the break of the communications with Russia. It existed——

Q. I am talking of the documentary authority, the alleged canonical authority for the organization of this independent district. Is that based on the order of November 20, 1920, or on something else?

A. What was it?

Q. 1920.

A. 1920, yes.

Q. In other words, the American group has the same foundation as the Yugoslavia group, isn't that so?

A. Yes, in the last instance, yes. There is a great dif- [fol. 255] ference, if you permit me to say, because American Church has its own Council. It is a national Church, not a Church of the emigres. It is a Church of American citizens.

Q. Did you ever state in writing that the American Church in joining the Yugoslav group had been "subjugated" to the Yugoslav group?

A. What "subjugated"?

Q. Did you ever state in writing that by joining the

Yugoslav group the Yugoslav group had "subjugated" the so-called American Metropolitan District?

A. I don't remember I have written it.

Q. Didn't you ever state in writing the following: "Subordinating ourselves to this Synod (referring to Yugoslavia) our Church in substance subordinated itself to a group of bishops who really have no jurisdiction themselves. Because of this some people are inclined to speak only of our cooperation with the Synod. This term 'cooperation', however, is not correct, because the acts of 1936-37 definitely subjugated our Church under the Synod Abroad." Did you ever make that statement?

A. As I was in a position——

Q. Yes or no, that is all, Professor. Did you make it?

A. I don't remember.

Q. That is enough.

A. I don't remember exact terms.

Q. That is enough. That is all.

A. What is the origin of this writing? I have written personally to Metropolitan Theophilus——

Q. You don't remember?

A. I don't remember the exact terms of my letter.

Q. Are you raising a point that you don't remember the exact terms, but didn't you ever state the substance of this that I have read?

[fol. 256] A. It was a danger of subordination. In practice, in fact, we don't feel that way about it.

Q. Isn't it a fact that by reason of this relationship with Yugoslavia bishops, so-called American bishops had to be confirmed by the Yugoslav Synod? Yes or no.

A. Probably yes. I think so.

Q. Why the doubt? Don't you know?

A. No, I don't know exactly. Probably yes.

Q. Probably yes. Isn't it a fact that before honors could be conferred on so-called American priests, you had to get the permission of the Yugoslav bishops?

Mr. Arkush: There is a written document that prescribes all that. It is right here in court and we can——

The Court: What is he, a history expert, or an expert on canonical law?

Mr. Adler: History.

The Court: Is he qualified to answer these questions?

Mr. Arkush: We didn't qualify him as a canonical expert. We deliberately refrained from doing so.

Q. Well, to your knowledge, isn't is the fact that the Bishop of Alaska, of this Metropolitan District, before he was confirmed, had to pledge loyalty to the Yugoslav Synod? To your knowledge, yes or no?

A. I don't know exactly. I heard about it.

Q. In 1947 the Metropolitan District here withdrew from the Yugoslav Synod, did it not?

A. When?

Q. In 1947 or 1946.

A. Yes. In the Cleveland convention.

[fol. 257] Q. So that the situation of the Metropolitan District, to summarize it, is that they declared their independence or autonomy of Moscow in 1924, in 1937 they joined Karlovitz, and in 1947 they withdrew from Karlovitz. That is in substance the fact, is it not?

A. Yes, more or less.

Q. Were you present at the convention of the Metropolitan District in 1946?

A. At Cleveland, yes, I was present.

Q. And did you in connection with others prepare a memorandum concerning the status of the Metropolitan District and the Church in Russia for that convention?

A. Yes, before this convention I signed a memorandum.

Q. You signed it. You were one of the authors of it?

A. Pardon?

Q. You were one of the authors of that memorandum, weren't you?

A. One of the authors.

Q. Now, I show you this translation and ask you whether that is not a translation of the memorandum that you signed and in part authored?

A. What do you wish me to read?

Q. Read the whole thing. It won't take more than a couple of minutes.

A. Just ten minutes. Give me the Russian text.

Q. You can read English, can't you?

A. Yes, but I cannot confirm the exactitude of the translation. What do you expect from me?

Mr. Arkush: If this is on canonical and not historical matter, I am going to object to it anyhow.

Mr. Adler: While the witness reads the Russian I would like your Honor to read the English because I think it is a basic document.

[fol. 258] The Court: I won't read it until it is in evidence. I am the trier of the facts.

Mr. Adler: Well, I offer it in evidence.

Mr. Arkush: Let me see it.

The Witness: Now I have finished.

By Mr. Adler:

Q. That is the memorandum that you signed and partly authored, is that right?

A. Yes.

Q. And you submitted that to the convention of 1946?

A. Not officially. We have published it in newspapers.

Q. Well, didn't you submit it to the chief authorities of this Metropolitan District?

A. No, it was a private letter. I was not a member of the Sobor.

Q. I didn't ask you that. After you wrote that you didn't put it in your pocket, did you? You gave it to somebody?

A. We have sent it to some bishops, to Metropolitan, and to newspapers.

Q. That is right, for consideration at the convention?

A. Yes. It was not read at the convention itself, but it doesn't matter.

Q. But you submitted it to the Metropolitan and his associates?

A. Yes.

Q. The chiefs of that convention?

A. Yes.

Q. And isn't it a fact that the resolution that was adopted at that convention in 1946 was in part based upon this memorandum?

A. I hope so, yes.

Q. Well, haven't you read that resolution?

A. Yes, I hope so, that we have influenced. We were not——

Q. Isn't the language almost identical with this memorandum?

A. It is not identical, but I think substantially it is the same.

[fol. 259] Mr. Arkush: Your Honor, I have no objection to this going in evidence with the understanding that before the final submission of the case the accuracy of the translation may be checked.

The Court: All right. It will be received.

Mr. Adler: I wonder, your Honor, if you could take five minutes to read it, because it clarifies a lot of points in my opinion. I wouldn't ask you to do that unless I genuinely felt so.

(The document was handed to the Court.)

The Court: This has all been said a long time ago.

Mr. Adler: I know, but it crystallizes the whole thing.

(Received in evidence and marked Defendants' Exhibit I.)

By Mr. Adler:

Q. Recently, within the early part of this year, there was a split in this Metropolitan District, was there not?

A. When?

Q. Recently, in early 1947 or late 1946?

A. What do you mean by a split?

Q. Well, didn't four bishops and their parishes withdraw from the Theophilus organization?

A. Yes.

Q. And organize their own organization?

A. Yes.

Mr. Adler: That is all.

Re-direct examination.

By Mr. Arkush:

Q. Professor Fedotov, you made some reference in your cross-examination to the Synodal Church. That is the [fol. 260] same thing as the Renovated Church, is it not?

A. Yes. After Sobor of 1923 they changed the name.

Q. When you said in response to Mr. Adler's question

that the decrees of the acting locum tenens Sergius recalled or revoked the 1920 Ukase of Patriarch Tikhon, you meant only as to the Karlovitsi Synod, didn't you?

A. I am sorry?

Q. You referred only to the Karlovitsi Synod?

A. (No answer.)

Q. You testified in effect that later decrees of the Patriarchal office revoked or recalled the 1920 Ukase. You didn't mean that they revoked the effect of that Ukase as to any other organization except the Karlovitsi Synod, did you?

A. Yes.

Q. It didn't revoke it as to any other?

A. Only to the Karlovitsi Synod, not all churches abroad.

Q. The word "Karlovatsk" as used in the publication of the Patriarchal Church known as "The Truth About Religion" could refer to people adhering to the Karlovitsi Synod in any part of the world, couldn't it, the expression "Karlovatsk"?

A. I don't know. It is a matter of interpretation.

Q. It could refer to people adhering to the Karlovitsi Synod in any part of the World?

A. It can be, yes.

Mr. Arkush: Now, your Honor, I offer in evidence the documents known as Plaintiff's Exhibits 11 and 12 in the case of Kedrovsky against Rojdesvensky. They are a short extract from the minutes of the Synod, not Sobor, the Synod of the Renovated Church, and the diploma or credentials of Kedrovsky, on which the Appellate Division awarded him possession of the Cathedral. I want to make absolutely sure, without any question, that those papers [fol. 261] emanated from the Renovated and not from the Patriarchal Church.

Mr. Adler: I object to these. I don't see the materiality of it.

The Court: Is your objection based on materiality?

Mr, Adler: Yes.

The Court: Overruled. They will be received.

(Plaintiff's Exhibits 18, and 18-A for Identification, received in evidence and marked Plaintiff's Exhibits 18 and 18-A.)

By Mr. Arkush:

Q. Now, Professor Fedotov, I show you Plaintiff's Exhibit 18 and ask you who was the man referred to in that exhibit as Chairman Metropolitan Evdokim?

A. I think it is a member, a presiding member, of the Synodal Church at the time.

Q. The Renovated Church?

A. Yes.

[fol. 262] (Received in evidence and marked Plaintiff's Exhibit 19.)

By Mr. Arkush:

Q. I am showing you the names which appear at the end of Plaintiff's Exhibit 19, and I ask you who these people were that signed that document?

[fol. 263] A. Barnabas is the Patriarch of the Serbian Church. Patriarch Eulogius was the head of the Western European Church, Russian Church in Exile. Metropolitan Theophilus, the head of the American Church. Metropolitan Anastasius the head of the Balkan or Southern European Church which——

Q. It is referred to in the Constitution as the Near East.

A. (Continuing) Which before was called the Karlovitsi.

Q. Is that the same as the Near East referred to in Article 4, Section 1 of the exhibits?

A. Yes; Near East.

Q. What happened in the case of the Western Diocese? Did the clergy and laity confirm?

A. Very soon, after some months, after this agreement, Metropolitan Eulogius separated himself from this common jurisdiction and went under the jurisdiction of Ecumenical Patriarch of Constantinople.

Q. And is that where a majority of the Western European parishes are today?

A. Yes, they are.

Q. So that the Synod from the time of the separation of the Western Diocese consisted simply of three Metropolitans, Far East, Near East, and North America?

A. Yes.

Q. And of those Districts the North American was

much more the populous, wasn't it? It had many more parishes?

A. Certainly.

Mr. Arkush: That is all.

Re-cross-examination.

By Mr. Adler:

Q. Just one or two questions. I show you a document and ask you whether you ever saw this before?

A. No, I did not see, but I heard.

[fol. 264] Q. You heard about it?

A. Yes.

Q. In your memorandum, Defendants' Exhibit I, you refer to the matter of the demand concerning loyalty to the Soviet Government. Do you recall that reference?

A. Yes.

Q. When you made that statement, did you base it on any documentary—please note what I say—evidence as to demand for loyalty to the Soviet Government?

A. What do you mean by that?

Q. You know what I mean by a document, don't you?

A. Now I personally——

Q. Excuse me. I beg your pardon.

A. (Continuing) —did not receive the document.

Q. Professor, I beg of you, you must answer my questions, and specifically. Don't go beyond the specific requirements of the question. You know what I mean by a document, don't you, yes or no?

A. I refuse. It is insulting.

Q. Well, precisely.

A. It is insulting.

Q. Now I ask you whether the statement you made in Defendants' Exhibit I as to the alleged requirements concerning loyalty to the Soviet Government was based upon any document?

A. In last instance, that.

Q. Is the answer yes?

A. Yes.

Q. What document? Have you got that document?

A. I did not read the original of this document but my

bishops, my priests, whom I know, received such a document, Ukase.

Q. Have you got that document? Do you have the document here?

A. Yes.

Q. Are you referring to the Ukase of February 16, 1945, by the Patriarch Sergius?

A. No, 1927.

Q. You are not referring to this document?

A. No, 1927.

[fol. 265] Q. So far the only document in evidence relating to the subject is Defendants' Exhibit D, which is the Ukase of February 16, 1945, wherein the Patriarch stated to the American delegation that went to the Sobor in Russia in 1945, that one of his wishes was that, "In the name of the American Orthodox Church declares its abstention from political activities against the U.S.S.R. and gives corresponding orders about this to all the Parishes?"

A. It is quite different. It is a different document.

Q. You wouldn't say that that language justifies a statement that there was a demand for loyalty to the Soviet Government, would you?

A. No, it is different. This demand was given up by the Patriarch at that time.

Q. But you haven't any document, this alleged document?

A. Not in my pocket.

Mr. Adler: All right. That is all.

Mr. Arkush: That is all.

(Witness excused.)

Joseph Pishtey, residing at 46 Seymour Street, Yonkers, New York, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Kilroe:

Q. Father, you are a duly ordained priest in the Russian Orthodox Church of North America?

A. Yes, I am.

Q. What is your official connection with that Church?

A. I am Pastor of the Holy Trinity Russian Orthodox Church of Yonkers, New York, and Treasurer of the Met- [fol. 266] ropolitan Council of the Russian Orthodox Church of North America.

Q. That was the group that recognized Metropolitan Theophilus?

A. That is right, sir.

Q. Could you tell the Court how many parishes you have in your group of churches?

A. According to our records we have two hundred churches in the United States, forty in Canada and nine in Alaska.

Q. Do you know how many churches there are in the so-called Benjamin group, the Metropolitan Benjamin group?

A. No, I do not. I can't hazard a guess, Whatever I would say would be guessing.

Q. Well, could you give us an approximation of how many churches, parishes, are connected——

Mr. Adler: The witness said he doesn't know.

The Court: Sustained.

Mr. Adler: Also may I, perhaps a little tardily, note that I object to the testimony elicited on the ground of immateriality.

The Court: Sustained. Strike it out.

Mr. Kilroe: Just one other question.

Q. Father, do you know where Metropolitan Theophilus is now?

A. Yes, I do. He is in San Francisco.

Q. What is his physical condition at this time?

A. I visited the Metropolitan at San Joseph's——

Q. No, just tell what his physical condition is?

A. Considered very grave.

Mr. Adler: If you say he is ill, I will accept that statement.

Mr. Kilroe: That is all.

(Witness excused.)

[fol. 267] COLLOQUY

Mr. Kilroe: That is the plaintiff's case.

Mr. Adler: Before you actually rest I wonder if we can make the following stipulation: I think you will stipulate that the plaintiff paid nothing for the deed it got from Mr. Oustinoff?

Mr. Arkush: Yes.

Mr. Adler: I think you will agree that since its incorporation in 1925 the plaintiff did not assert any right to possession and did not make any effort to obtain possession of the Cathedral until April 9, 1945, when this suit was brought?

Mr. Arkush: Well, I will stipulate that the plaintiff took no step to eject the occupants of the Cathedral, namely, John Kedrovsky and Nicholas Kedroff, and John Kedroff, until this suit was brought.

(Colloquy)

Mr. Arkush: I would also like to have at that point a stipulation from Mr. Adler that the present defendant, Metropolitan Benjamin, took no steps to assert his alleged right to possession of the Cathedral.

Mr. Adler: I will agree.

Mr. Arkush: Up to the time he sued John Kedroff in the fall of 1945.

Mr. Adler: I agree.

Mr. Arkush: If there is any question of laches it works both ways.

(Colloquy)

I don't think there is any laches in the case.

Mr. Adler: I think you will agree too that the object of this suit is to place Metropolitan Theophilus in the [fol. 268] possession of the Cathedral as alleged Archbishop, isn't that so?

Mr. Arkush: The object of the suit is to eject the defendants.

Mr. Adler: There is no stipulation on that last point?

Mr. Arkush: No.

Mr. Adler: Very well.

The Court: Does the plaintiff rest?

Mr. Kilroe: Yes.

Mr. Adler: Your Honor, I want to make a motion and I will state my grounds very briefly.

I move to dismiss the case for failure to make out a cause of action on the following grounds: There is no cause of action for ejectment made out because to do so the fundamental ingredients are not merely title but possession, the right to possession, and an ouster, forcible or otherwise, of the plaintiffs. All that the plaintiffs have proved here is a paper title. They have not established any possession by them at any time. They did not establish that they have been ousted out of possession at any time, and they have not proved a right of re-entry. Consequently, as a matter of proof, relating to the nature of the action, namely, ejectment, the plaintiff has failed to make out a case.

The second ground is that the plaintiff at most has shown a paper title and holds this title as custodian or trustee for the duly accredited Archbishop appointed by [fol. 269] the Supreme Church Authorities in Russia. And the Kedrovsky case has held that such duly accredited Archbishop appointed by said Authorities is the only person who has the right to possess, occupy, and use that Cathedral. The plaintiff corporation holding the title in trust for such purpose is in the anomalous position of trying to eject from the building the beneficiary of the trust.

The third ground is that the action is barred by the Statute of Limitations and laches.

The Court: Motion denied.

Mr. Adler: Exception.

May the record also show that before I made the motion I moved to strike from the record the testimony of the witness, Professor Fedotov, given on direct, on the ground that most of it was hearsay, it was incompetent, and irrelevant to the case.

The Court: After the conclusion of the trial, in your memorandum, you may specify by relation to folios in the minutes just what portion you claim is inadmissible and I will take it under advisement then. Part of it no doubt should be stricken.

Mr. Adler: I want to add one more ground to the motion to dismiss, if I may.

The Court: As far as I am concerned, as I stated before, nine-tenths of the evidence in this case is immaterial. There is a sufficient basis in the documents and most of the testimony and argumentation concerning the documents would more properly be the function of counsel's briefs.

[fol. 270] Mr. Adler: May I add one other ground to the motion to dismiss, namely, that the alleged justification, because of alleged political conditions in Russia, for the purported declaration of autonomy of this so-called Metropolitan District is wholly unwarranted in fact and in law, and even if they felt themselves justified in their own conscience that they had to leave, they could not take with them the property which heretofore had been administered by the Supreme Church Authority in Russia.

The Court: They have two arrows in their quiver. One is canonical and one is the statutory law of the State of New York. I will take it all under consideration.

DEFENDANTS' EVIDENCE

Mr. Adler: Metropolitan Gregory.

Mr. Kilroe: If the Court pleases, to facilitate the trial of this action, if the attorney for the defendants will tell us what he hopes to prove through Metropolitan Gregory we may be able to stipulate that he would testify to the facts he hopes to adduce.

Mr. Adler: I think that is a sensible suggestion.

I expect him to testify to the following, and after you have read that, plus a few more points, and if you agree as to those, maybe we can agree as to the balance.

[fol. 271] METROPOLITAN GREGORY TCHUKOV, residing at the Hotel Westbury, New York, N. Y., called as a witness on behalf of the defendants, was duly sworn.

(Discussion ensued off the record.)

Mr. Kilroe: We will agree to this stipulation.

Q. Mr. Adler: Your Honor, it is stipulated that in lieu of the testimony of his Grace, Metropolitan Gregory, who is on the witness stand——

Mr. Kilroe: No, if he were called——

Mr. Adler: That having been called as a witness——

The Court: Having been called as a witness, if he proceeded to testify he would testify to the following, without conceding the actuality of the testimony.

Mr. Kilroe: That is correct, your Honor.

Mr. Adler: Maybe I don't think they would go so far. Maybe they would concede it, wouldn't question it.

Mr. Kilroe: No, we won't concede the testimony of anyone.

Mr. Adler: All right.

The Court: In other words, you think they might concede that the testimony is the fact?

Mr. Kilroe: That isn't true.

The Court: That is all right with me.

Mr. Arkush: No, your Honor.

Mr. Adler: 1. I am a Metropolitan and Archbishop of the Russian Orthodox Church and I am a permanent member of the Holy Synod which, together with the Patriarch, is the Supreme Church Authority of the Russian Orthodox Church.

[fol. 272] 2. By reason of my studies in theological academies, my work in the Russian Church for about fifty years, and the official positions therein I have held, I am familiar with the canons, rules, and usages of the Russian Orthodox Church and the condition of the Church in Russia during the last fifty years.

3. The Enactments of the Sobor of 1917-18 have been since their adoption and now are binding upon the entire body of the Russian Church including all dioceses and sub-divisions thereof.

4. One of the Enactments of this Sobor provided that the Patriarch and the Holy Synod, of which he is the head, were to be the Supreme Church Authority of the Russian Church and since 1917 said Patriarch and Holy Synod have been and now are such Supreme Authority of the Russian Church.

5. Shortly after 1918, various movements in the Russian Church, known as the Living Church, the Church of Ressur-ection, and so forth, were initialed, and under the auspices of these Churches a Sobor was held in 1923. This Sobor is not regarded as having met with canonical re-

quirements because it was not called by the Patriarch and the Holy Synod. However, within a few years thereafter these Church movements subsided and practically all of the leaders, adherents and parishes of this Church joined with and were absorbed by the Patriarchal Church.

We do not claim that the convocation of the Sobor of 1923 was due to any force or violence or any intervention [fol. 273] by the civil authorities, our position being merely that we do not regard it as canonical, because it was not called by due procedure according to the constitution of the Church, namely, by the Patriarch and his Holy Synod.

6. The Sobor of 1917 elected Tikhon as Patriarch. He died in 1925. With relation to his alleged arrest, I do not believe that he actually was imprisoned, but for a short period he was confined to his quarters and about 1923 he was given full liberty and thereafter acted as Patriarch. After Tikhon's death in 1925, Metropolitan Peter was elected temporary locum tenens and in December 1925 Sergius became temporary locum tenens, with full powers of the Patriarch, and thereafter, in 1943, at a local Russian Sobor he became Patriarch. And at the Sobor of 1945, Sergius having died in 1944, Alexii was elected Patriarch, and he is the Patriarch today, and I am a permanent member of his Holy Synod.

7. The Archdiocese of North America and the Aleutian Islands is a diocese of the Russian Orthodox Church and is ruled by an Archbishop appointed by the Supreme Church Authority of the Russian Church which may suspend or remove such Archbishop and appoint another in his place at its pleasure.

8. Saint Nicholas Cathedral in the City of New York, was acquired about 1900 and the official records in the Archives of the Russian Church in Moscow disclose that the Russian Church in Russia and the Russian Government contributed a sum in excess of $150,000.00 for the acquisition of the Cathedral, and up to 1917 these bodies con- [fol. 274] tributed additional sums for the maintenance of said Cathedral.

9. Saint Nicholas Cathedral, in accordance with the rules and usages of the Russian Orthodox Church, must be possessed, occupied, and used by the Archbishop of the

American Archdiocese, who is duly appointed by the Supreme Church Authority, above referred to, namely, the Patriarch and the Holy Synod, and said Cathedral may not be occupied by any other official or person.

10. Canon law and the rules and usages of the Russian Orthodox Church do not permit any diocese or other subdivision or constituent part of the Church for any reason whatsoever to secede from or declare itself independent of the main body of the Church at large or declare itself autonomous or a self-governing body or district.

11. The action of the group of Russian Orthodox churches in America and the resolutions adopted by them in the convention or local Sobor in Detroit of 1924, and the purported election of Archbishop Platon Rojdesvensky as the Archbishop of said Churches violates the canons, rules, and usages of the Russian Orthodox Church and are null and void.

12. By reason of such conduct of the aforesaid Platon, the Supreme Church Authority suspended said Platon in 1924 and by a decree in 1933 the Supreme Church Authority declared, (1) that the proclamation of the North American Diocese as autonomous was in opposition to the will and without the consent of the Moscow Patriarchate.

[fol. 275] Mr. Arkush: Just a minute. Are you quoting from a document that is in evidence?

Mr. Adler: Yes, that is in evidence?

Mr. Arkush: All right.

Mr. Adler: (Continuing) And was an act violating Church discipline and the law of the Church; (2) that the religious group organized around Metropolitan Platon was declared schismatic; that this organization was declared illegal, and all their decisions and acts appointing bishops and other clergy are illegal and invalid; (3) Metropolitan Platon, because of such conduct, was summoned to a Court of Bishops for violating the canons and the laws of the Church and in the meantime Metropolitan Platon was placed under prohibition from performing divine services or any other ecclesistical acts.

13. The action of said group of Russian Orthodox churches in America in the convention or Sobor of 1934, purporting to appoint Theophilus as successor to Archbishop Platon and as Archbishop of said group of

Churches, and the resolutions passed at said Sobor, and the actions and resolutions at the subsequent Sobors of said group of Churches are likewise violative of the canons, rules and usages of the Russian Orthodox Church and are null and void.

14. In 1935 the Supreme Church Authority in Russia issued a decree suspending Metropolitan Theophilus and the clergymen associated with him in the alleged Metropolitan District and placed upon him a prohibition like that which had previously been placed upon Archbishop Platon for similar conduct.

[fol. 276] 15. By reason of the actions of Archbishops Platon and Theophilus aforesaid, they and their adherents have been and now are under suspension by decision of the Patriarch and his Holy Synod.

16. Metropolitan Benjamin was appointed by the Patriarch and the Holy Synod as Exarch and temporary Archbishop of the North American Archdiocese in 1933, and in 1934 he was duly appointed by the said Patriarch and Holy Synod as Ruling Archbishop of said North American Archdiocese and, as such Archbishop, is entitled, under the rules of the Russian Orthodox Church, to possess, occupy and use Saint Nicholas Cathedral as his residence, as a place of worship, and as the episcopal seat of the said Archdiocese.

17. That the order of November 1920, issued by Patriarch Tikhon, was of a temporary nature and was limited in time to such period as communications between the Patriarch and the bishops outside of Russia were unavailable; that upon the restoration of communications the effect of the order would cease, and in any event, any acts taken pursuant to said order were subject to confirmation of the Supreme Church Authorities. By successive decrees, in 1922 and 1923, Patriarch Tikhon declared dissolved this group of Bishops known as the Karlovitz Synod, declared their acts void and illegal, withdrew the authority of the order of November, 1920, and forbade these bishops from further conduct. This ruling was subsequently affirmed by decrees of 1928 and 1934 by Metropolitan Sergius, and this group of Karlovitz Bishops have no canonical standing whatsoever and all their acts since [fol. 277] 1922 are wholly and entirely invalid.

18. With respect to conditions of the Church in Russia, after the Revolution, the Church in Russia was separated from the State and as a consequence there was a renewed activity of Church life. Churches were opened for worship and the churches were well and fully attended throughout the period following 1917, and, in fact, to my observation, there was greater Church activity following the Revolution than had existed before. For a short period, there was punishment of some clergymen, not because they were clergymen, but because these clergymen in most cases were engaged in acts of opposition in the Civil War to the Revolutionary authorities.

The action of the Sobor of 1923 had little effect upon the Patriarchal Church. The resolutions passed by it shortly became a dead letter and the——

The Court: Do you contend that this should influence my decision here? Unfortunately we got sucked into all this immaterial matter.

Mr. Adler: That is right.

The Court: I was giving you gentlemen your heads for awhile.

Mr. Adler: I think that is the danger of it. I am trying to counteract anything this Professor said.

The Court: That is why I am acting abruptly today or we would be going on for three more days. I don't see the materiality of this, but go ahead.

Mr. Adler: I promise I will not take more than three minutes.

[fols. 278-279] That the constitutent parties of the Sobor of 1923 shortly died out and the Patriarchal Church functioned effectively and without restraint. In the years following, from 1925 to date, the Church has received greater liberty and is functioning freely as an Orthodox Church, without interference by the civil authorities, and the political views held by the authorities, and any atheistic sentiment that they may have in no way interferes with the unhampered activities of the Russian Orthodox Church.

Counsel asked me to stipulate that there was never a Church trial of Metropolitan Theophilus, and I will state the fact that, as far as I know there never was a trial. Whose fault it was is another matter.

Mr. Kilroe: No cross-examination.

(Witness excused.)

Mr. Adler: Defendants rest.

The Court: Before you rest——

(Discussion ensued off the record.)

The Court: I will reinstate the testimony of Father Pishtey and allow you to cross-examine him if you want to.

Mr. Adler: I don't want to. His testimony simply was that there were 200 Churches in America, 40 in Canada and 9 in Alaska.

The Court: Are you resting?

Mr. Adler: With one motion.

Mr. Arkush: May that go on the record? It is stipulated that upon the withdrawal from the Metropolitan District of Archbishop Vitaly and three other bishops mentioned in the evidence, only three Parishes followed from the Metropolitan District.

[fol. 280] Mr. Kilroe: As I understand the law, your Honor—I may be wrong—I have four Soviet statutes I wanted you to take judicial notice of.

Mr. Adler: Soviet statutes?

Mr. Kilroe: Yes, pertaining to church property, which I think is competent under the second theory and I believe I will just cite those in the record without reading them and later on we can submit them, and we will give you a copy of them.

Mr. Adler: Well, put it this way: You offer them, I object to them, and then the Judge will reserve decision.

The Court: Put it this way: You are asking me to take judicial notice of four Soviet statutes which you are going to set forth in your memorandum?

Mr. Kilroe: That is right, your Honor.

The Court: That is all. I am not ruling on it.

Mr. Adler: All right. That is a way out.

The Court: Just cite them for the record.

Mr. Kilroe: One of them is decree of January 23, 1918, Sections 12 and 13 of that decree, Law of April 8, 1929, Section 25 of that; and instructions 2 and 3 of Law of April 8, 1929, Section 114 (3a). Also the Law of April 8, 1929, RSFSR Laws (1929), (Item 353).

[fol. 281] PLAINTIFF'S EXHIBIT 1.

CHAPTER 463

AN ACT to incorporate Saint Nicholas Cathedral of the Russian Orthodox Church of North America

Became a law April 8, 1925, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Platon Th. Rozdestvensky, Benjamin G. Basalyga, John N. Telep, Serge A. Ughet, Valerian E. Greaves, Theodore N. Brevern, Simon A. Bolan, Victor J. Stalevsky and Alexander J. Makarevich and their successors, who shall be appointed or elected as hereinafter prescribed, are hereby created a body politic and corporate under the name and style of Saint Nicholas Cathedral of the Russian Orthodox Church in North America, and by that name shall have perpetual succession and be capable of suing and being sued, and of acquiring, taking and holding in trust or otherwise, by purchase, gift, grant, devise or bequest (subject, however, to all provisions of law relating to devises or bequests by last will and testament) all and any estate or property real or personal necessary or proper for all or any of the objects or purposes of the said corporation, and to sell, convey or otherwise dispose of the same; and the said corporation shall have all the powers, and be subject to the provisions, so far as they may be applicable and not inconsistent with this act, of sections ten, eleven, twelve, thirteen and fourteen of the general corporation law.

[fol. 282] § 2. The object and purpose of the said corporation shall be the acquiring, maintaining and management of a cathedral church and its appurtenances in the city of New York as a central place of worship of the Russian Orthodox Church in North America, in accordance with the doctrine, discipline and worship of the Holy Apostolic Catholic Church of Eastern Confession as taught by the holy scriptures, holy tradition, seven oecumenical councils and holy fathers of that church; together with the

residence of the ruling archbishop of the Russian Orthodox Church in North America, and such incidental cathedral foundations, schools, faculties and other religious, charitable and educational work as may be properly connected therewith in and for the said Russian Orthodox Church in North America.

§ 3. The persons named in the first section of this act, shall be and are hereby constituted the first trustees of the said corporation, and they shall hold office and have power to fill vacancies in their own number, until their successors shall be appointed or elected, under the constitution to be adopted as hereinafter prescribed; provided, however, that the ruling archbishop of the said Russian Orthodox Church in North America, exercising jurisdiction as such, for the time being, shall always be ex-officio a member and trustee and the official head and presiding officer of the said corporation.

§ 4. The said corporation shall have power to adopt a constitution, prescribing the number of trustees, in addition to the said archbishop, of whom at least five shall be [fol. 283] laymen, and the mode of appointing or electing the said trustees; and to amend such constitution in the mode it shall prescribe for its amendment; and the said corporation shall also have power to enact statutes or by-laws not inconsistent with such constitution, for the government, regulation and management of the said corporation, its officers, business, property and affairs, and the same from time to time to amend, repeal or modify; provided, however, that such constitution, statutes and by-laws, shall not be inconsistent with this act, or with any law of the state.

§ 5. The access to said cathedral for worship shall always be free for all worshippers.

§ 6. The religious corporation known under the name of Russian Orthodox Saint Nicholas Church in New York organized and existing under the religious corporation law of the state of New York or any other religious corporation holding or claiming any interest in any real or personal property shall be and is hereby authorized, by its trustees or trustee for a nominal or other consideration to sell, convey, assign and transfer to the Saint Nicholas Cathedral of the Russian Orthodox Church in North

America any or all of the real or personal estate of the said Russian Orthodox Saint Nicholas Church in New York or other such corporation.

§ 7. This act shall take effect immediately.

[fol. 284] PLAINTIFF'S EXHIBIT 3

Minutes

of the first meeting of the Trustees of the St. Nicholas Cathedral of the Russian Orthodox Church in North America, held on April 23rd, 1925, at the premises of the Rectory of the St. Nicholas Cathedral, 15 East 97th Street, City of New York.

There were present: President of the Corporation: Most Eminent Metropolitan Platon Rozdestvensky.

Trustees: V. Rev. Archimandrite Veniamin Basalyga, Rev. John Telep, Hon. Serge A. Ughet, Mr. Valerian E. Greaves, Mr. Theodore N. Brevern, Mr. Simon A. Bolan, Mr. Victor J. Stalevsky, Mr. Alexander J. Makarevich.

There were also present: The Dean of the Cathedral V. Rev. Leonid Turkevich and Mr. G. G. Kisevalter.

The meeting was opened at 9:30 p. m. by a prayer "Christ is risen" sung by all present.

After having stated the reasons and purposes of the incorporation of the St. Nicholas Cathedral and expressed his profound satisfaction that the Cathedral thereby will forever be preserved safe as a central place of worship of [fol. 285] the whole Russian Orthodox Church in North America and seat of the Church Administration in this country, the President requested Mr. Greaves to act as secretary of this meeting and first to read to the Board an Act to incorporate St. Nicholas Cathedral of the Russian Orthodox Church in North America, approved by the Governor of the State of New York on the 8th day of April, 1925.

Thereupon the secretary read the said act and reported to the meeting that it was possible to have this act passed by the Legislature and approved by the Governor only because Mr. George Zabriskie kindly consented to help His Eminence in preparing the draft of said Act and

through his personal influence interested several Assemblymen and Senators in its passage. Without Mr. Zabriskie's assistance not only it would take much longer time to have this statute enacted, but it is doubtful that it would be possible to have the Act passed at all.

Upon motion duly made, seconded and carried, it was unanimously

Resolved: that a copy of the act to incorporate the St. Nicholas Cathedral of the Russian Orthdox Church in North America be prefixed to the minutes of this meeting, and that His Eminence Metropolitan Platon be requested to convey to Mr. Zabriskie the profound gratitude of the Board for his most valuable assistance in organizing the corporation and an unforgettable service rendered thereby to the Russian Orthodox Church in this country.

Thereupon Mr. Greaves stated that on April 17th, 1925, Hon. Michael M. Oustinoff as Trustee of the Russian Orthodox St. Nicholas Church in the City of New York, pur-[fol. 286] suant to the provision of the said Act, conveyed to the St. Nicholas Cathedral of the Russian Orthodox Church in North America the premises of the Cathedral and Rectory, and that the deed executed by Mr. Oustinoff to this purpose is now being recorded.

Upon motion duly made, seconded and carried, it was unanimously

Resolved: that notice be taken of the said conveyance, and that the warmest thanks of the Board be expressed to Mr. Oustinoff for his constant and unwavering protection of the interests of the Cathedral in the capacity of its Trustee, which was especially valuable during the trouble and insidious persecutions which our Church was recently living through.

Then the Secretary submitted to the meeting a draft of Constitution of the Corporation providing for the composition of the Board of Trustees of the Corporation and mode of their appointment and election.

The draft was read by articles and after deliberation the following text was unanimously adopted as the fundamental constitution of the Corporation.

Constitution

In the Name of the Father, of the Son and of the Holy Ghost.

In the exercise of the powers vested in us by an Act of Legislature of the State of New York entitled "An Act to Incorporate St. Nicholas Cathedral of the Russian Orthodox Church in North America", approved by the Governor of the State of New York on the 8th day of April, [fols. 287-289] 1925, and in full realization of our sacred duty to protect the interests of the Russian Orthodox Church, to preserve her unity, and secure forever her welfare in this country, we, the Trustees of St. Nicholas Cathedral of the Russian Orthodox Church in North America, do hereby set forth and ordain the following Constitution providing, however, that nothing therein shall be construed as a surrender by the Board of Trustees of any part of the final authority and responsibility solemnly imposed upon them by the Charter for maintenance and management of the Cathedral and its appurtenances in accordance with the doctrine, discipline, and worship of the Holy Apostolic Catholic Church of Eastern Nations, as taught by the Holy Scriptures, Holy Tradition, the Seven Oecumenical Councils and Holy Fathers of that Church.

[fol. 290] At the meetings of the Board of Trustees, whether regular or special, nine members shall constitute a quorum.

In the absence of a different provision in the constitution or statutes all questions shall be decided by simple majority vote of the Trustees present at the meeting.

Article 5. The Board of Trustees shall each year elect from their own number at the Annual Meeting a Secretary and Treasurer, the Secretary to have custody of the Seal and of the records of the corporation, the Treasurer to receive, husband, and disburse the funds of the same. In case of vacancy arising during the current year in the office of the Secretary or Treasurer, the Board of Trustees shall elect a person to fill such a vacancy, to hold office until the next Annual Election.

Article 6. The fiscal year of the corporation shall begin on the first day of September in each year. The Secretary and Treasurer shall prepare complete reports of the con-

dition and operations of the corporation for the past fiscal year and submit it to the next Annual Meeting of the Board of Trustees.

The Trustees and Officers of the corporation shall receive no salary or other compensation for their work.

Article 7. Amendments to this Constitution may be made by the Board of Trustees upon motion duly seconded by two-thirds vote of all the members of the Board provided [fol. 291] that a two months' written notice of the proposed amendment shall have been given to each Trustee.

After deliberation and upon motion duly made, seconded and carried, it was unanimously

Resolved: that detailed draft of the statutes of the Corporation shall be prepaired and submitted to the next regular meeting of the Trustees to be held on the first Wednesday in the month of June, 1925 and

that a committee be appointed for drafting said statutes cinsisting of V. Rev. L. Turkevich and Messrs. V. E. Greaves, M. M. Karpovich and G. G. Kisevalter, and

that said statutes shall provide that the Ruling Archbishop of the Russian Orthodox Church in North America, who at this time is His Eminence, Metropolitan Platon, duly appointed to this office by His Holiness, the late Patriarch Tikhon, shall have the right to nominate the dean and other clergy and servants of the Cathedral; and use the Cathedral at his discretion for all Episcopal acts and for other religious, benevolent and educational purposes, and have the general and unrestricted direction of the re- [fols. 292-293] ligious services in the Cathedral, and to use the building known as the rectory adjoining the Cathedral as his personal residence, and that it shall be lawful for the Archbishop through the Dean of the Cathedral, or any other person to be designated by him, to organize a parish at the Cathedral consisting of the Communicants worshipping at the Cathedral Church and

that these two last provisions shall take effect immediately.

[fol. 294] PLAINTIFF'S EXHIBIT 4

SUPREME COURT, NEW YORK COUNTY

JOHN S. KEDROVSKY, as delegate of the Holy Synod of the Russian Orthodox Greek Catholic Church, and as Archbishop of the diocese of North America and the Aleutian Islands of said church, and Archbishop and Consistory of the Russian Orthodox Greek Catholic Church, *Plaintiffs*,

against

PLATON ROJDESVENSKY and LEONID TURKEVICH, *Defendants*

The defendants above named having appealed to the Appellate Division of the Supreme Court for the First Department from the judgment entered herein on January 19th, 1925, in the office of the clerk of the County of New York, and said appeal having been argued and said Appellate Division having by an order dated the 27th day of November, 1925, and entered in the office of the Clerk of the Appellate Division of the Supreme Court, First Department, on December 3rd, 1925, reversed said judgment so appealed from with costs of the appeal to the plaintiffs, and having reversed certain findings of fact and conclusions of law made herein and dated January [fol. 295] 19th, 1923, and having made new findings of fact and conclusions of law in lieu of those so reversed, determining among other things that John S. Kedrovsky is the lawful archbishop of the diocese of North America and the Aleutian Islands of the Russian Orthodox Greek Catholic Church and as such entitled to occupy the premises mentioned in the complaint, and having directed the entry of judgment in favor of the plaintiffs and against the defendants as below provided with the costs of the action to be taxed by the clerk, and a certified copy of such order having been duly filed in the office of the clerk of the County of New York on December 4th, 1925, and the costs having been duly adjusted by said clerk, it is on motion of Ralph M. Frink, attorney for the plaintiffs.

Ordered, Adjudged and Decreed that the defendants Platon Rojdesvensky and Leonid Turkevich and each of them be and he is hereby enjoined and restrained from oc-

cupying premises mentioned in the complaint, to wit: premises known as numbers 13-15 East 97th Street, in the Borough of Manhattan, City of New York, and as the St. Nicholas Cathedral of the Russian Orthodox Church, and it is further

Ordered, Adjudged and Decreed that the defendants Platon Rojdesvensky and Leonid Turkevich and each of them and their several agents or employees be and they hereby are enjoined and restrained from excluding John S. Kedrovsky, delegate of the Holy Synod of the Russian Orthodox Greek Catholic Church and archbishop of the diocese of North America and the Aleutian Islands of said church, from said premises known as numbers 13-15 [fol. 296] East 97th Street, in the Borough of Manhattan, City of New York, and as the St. Nicholas Cathedral of the Russian Orthodox Church, and from in any way preventing the said John S. Kedrovsky from occupying the said premises, and from interfering in any way with the occupancy of the said premises by said John S. Kedrovsky; and it is further

Ordered, Adjudged and Decreed that the counterclaim of the defendants herein be dismissed on the merits; and it is further

Ordered, Adjudged and Decreed that John S. Kedrovsky as delegate of the Holy Synod of the Russian Orthodox Greek Catholic Church and as archbishop of the diocese of North America and the Aleutian Islands of said church, and Archbishop and Consistory of the Russian Orthodox Greek Catholic Church recover of the defendants Platon Rojdesvensky and Leonid Turkevich the sum of $1,003.15 costs taxed by the clerk and that execution issue therefor.

Judgment dated December 4th, 1925.

James A. Donegan, Clerk.

PLAINTIFF'S EXHIBIT 5

(Pursuant to stipulation this exhibit, which is the Russian text of the ukase of November 20, 1920 (see Plaintiff's Exhibit 5A), is not printed.)

[fol. 297] PLAINTIFF'S EXHIBIT 5-A

The Most Holy Patriarch, the Holy Synod, and the Highest Church Council of the Orthodox Church of Russia

Decision of 7, 20 November 1920, No. 362.

With the blessing of the Most Holy Patriarch, the Holy Synod and the Highest Church Council, in their joint meeting, deliberated concerning the necessity, in addition to the instructions already issued in the circular epistle of the Holy Patriarch to be operative in case if the activity of the Diocesan Councils should stop, to issue similar instructions to the Diocesan Bishops for the case that a given Diocese be severed from the highest Church Administration, or in case the latter's activity stop, and on the basis of the former judgments it was resolved:

To issue instructions to the Diocesan Bishops, in the form of a circular Epistle of His Holiness, for their guidance in necessary cases, as follows:

1. In case that the Holy Synod and the Highest Church Council for whatever reason stop their Church-Administrative activity the Diocesan Bishop will address himself directly to the Holy Patriarch or to the person or body designated by the Holy Patriarch for that purpose, in order to obtain guiding instructions and decisions on matters, which, according to rules would have to come before the highest Church Administration.

2. In case the Diocese (Eparchy), for reasons of movement of the front, the change in government frontiers, etc., would find itself beyond all communication with the highest [fol. 298] Church Administration, or if the highest Church Administration itself with the Holy Patriarch at the head would for any reason discontinue their church-administrative activity, the Diocesan Bishop will immediately get into communication with the Bishops of his neighboring Dioceses for the purpose of organizing a superior instance of Church Authority for several dioceses which would find themselves in similar conditions. (Be it in the form of a temporary highest Church Government or a Metropolitan District or even otherwise.)

3. The care of organizing a higher Church Authority for a whole group of dioceses which would find themselves in conditions outlined in Point 2, is the indispensable duty of the oldest bishop in that group.

4. In case it would be impossible to establish contact with the bishops of the neighboring dioceses, and pending the organization of the highest instance of Church Authority, the Diocesan Bishop will himself assume the full hierarchical power granted to him by the Church canons and will do everything possible to regulate the local church life, and if necessary, to organize the diocesan administration suitable to conditions created, and will decide upon all matters which are placed within hierarchical authority by the canons, with the assistance of the existing offices of the diocesan administration (the Diocesan Convention, Council, etc., or the newly organized ones); in case, however, it would be impossible to organize the latter bodies he will act alone and under his own responsibility.

[fol. 299] 5. In case the situation mentioned in Points 2 and 4 should acquire a protracted or even permanent character, and especially when it would be impossible for the bishops to obtain the assistance of the organs of the diocesan administration, it would appear that the most expedient measure (in the sense of affirmation of church order) would be to divide the diocese into several small dioceses, for which the diocesan bishop will act as follows:

a. He would grant his vicar bishops, who until then according to law had but semi-independent rights, all rights of diocesan bishops and organize under them administrative bodies in conformity with the local conditions and possibilities;

b. He will install, upon sobornal judgment, with the rest of the diocesan bishops, if possible, in all important towns of his diocese new bishop's sees with semi-independent rights or independent.

6. A diocese which would be thus divided as per Point 5, would form itself into a Church District with the bishop of its capitol city as the head; which will take care of the administration of the local church matters according to canon.

7. In case a situation would arise as told in Points 2 and 4, where a diocese will have no bishop, then the Diocesan Council or in its absence the clergy and the laity will address themselves to the bishop of the diocese nearest and most accessible to them in convenience of communication and that bishop will assign to the widowed diocese his vicar or will assume charge of it himself; in cases men-[fol. 300] tioned in Point 5 he will act in that diocese according to Points 5 and 6, whereby at the existence of appropriate data the widowed diocese can be organized into a special Church District.

8. If for some reasons the widowed diocese will not invite the diocesan bishop, the latter, as mentioned Point 7, will assume the care of that diocese and its affairs at his own initiative.

9. In cases of extreme disorganization of church life, when some people or parishes will cease to recognize the authority of the Diocesan Bishop, the latter (if he finds himself in the situation outlined in Points 2 and 6), will not relinquish his hierarchical authority but he will organize out of the people who remain loyal to his parishes, and out of the parishes—districts and dioceses, allowing where necessary to perform services even in private houses and other similar places adapted for that purpose and discontinuing Church communion with the disobedient ones.

10. All measures that were taken locally in accordance with the present instructions and all measures taken thereafter must be submitted for confirmation later to the Central Church Authority when it is re-established.

[fol. 301] PLAINTIFF'S EXHIBIT 6

[Extracts from Minutes of Sobor held at Detroit, April 2-4, 1924.]

Dean Tourkevich

Dean Tourkevich began by saying * * * First the Sobor of Pittsburg- in 1922 elected the Metropolitan [Platon] as the head of the Diocese, bestowing upon him the title of "Metropolitan of All America and Canada." * * *

* * * * * * * *

Rumors appeared lately that Patriarch Tikhon has issued a decree dismissing Metropolitan Platon from the administration of the American Church, demanding that he return to Moscow at the disposition of the Patriarch.

In the document published in the local papers regarding that dismissal of Metropolitan Platon there were two features which were very important characteristics of this document.

First: The contents of the document show that the Metropolitan would receive his dismissal from the Bishop who would be appointed to replace him. This way of communication (by publication in the press) from Patriarch Tikhon to Metropolitan Platon appears unusual, especially if we consider that the first decree regarding the appointment of the Metropolitan to the North American see was sent him by mail.

Second: Also the date of that decree, February 1924, compared with the previous decree appointing him, dated September 29, 1923, appears strange. How could the Patri-[fol. 302] arch in so short a time (four months) freely change his will regarding Metropolitan Platon?

Also the language of the last decree appears suspicious; it resembles very closely the language of Mr. Kedrovsky which he used when, as you remember, he broke into the Cathedral premises in New York. In court Mr. Kedrovsky was trying to prove his rights as to the administration of our Church in America. He very clearly intimated that soon we would receive a decree from Patriarch Tikhon dismissing Metropolitan Platon, and only about a month

later a statement of Evdokim Meschersky was published in the press couched in almost the same language.

If we add to this the very definite information we possess that Patriarch Tikhon is very seriously sick, that the Soviet Government has placed four doctors in attendance upon him, that he already has had several heart attacks, we should realize the conditions under which Patriarch Tikhon has to exercise his authority over the Russian Church; somebody in Moscow is extracting decrees from the sick Patriarch and is using those decrees against him.

To discredit the Patriarch's personality in the eyes of the believers, a decree was published, for example, introducing a new calendar.

We all must know that we are threatened with the danger of losing Metropolitan Platon. In the meantime it is only he who can save our diocese. The merits of His Eminence the Metropolitan before the Russian American Church are recognized not only by our Mother Church of Russia but also by other denominations here in America. [fol. 303] And so we have two documents before us concerning our American Church: one, a decree of the legal Church Authority, undoubtedly forced by the Soviet power, of Patriarch Tikhon regarding the recall of His Eminence the Metropolitan to Moscow, and the other, from the Moscow Synod of the "Living Church", concerning the appointment as administrator of the Russian American Church of Mr. J. Kedrovsky, calling himself Metropolitan.

In view of the fact that we are threatened with great danger in the American courts at the present time, and particularly if America should recognize the Soviet Government, the Metropolitan desires to hear the voice of his diocese; he wants to know how we look upon the future of our Orthodox Church here in America, and upon the threatening danger of losing our church properties, and upon the throwing of the yoke of Bolshevism on the future generation.

[Valerian E. Greaves, Esq.,]

* * * lately there have been outside lawsuits with the "Living Church" which aspires, first, to seize the power over our Church in America and, secondly, to take our church properties.

In such a situation it would be a great mistake to think that we can or must submit to the trend of circumstances, let our Metropolitan go and await a new bishop.

We have just heard the narration of the Very Rev. Leonid Turkevich as to how a bishop is being appointed here and how Metropolitan Platon is being recalled. If it is established beyond doubt that violence is being used [fol. 304] on Patriarch Tikhon, that he is being forced to issue over his signature such acts as he could not issue under conditions of actual freedom, then we are not insured against all kinds of surprises, which could basically under...mine that church order and peace which have with such great labor already been practically arranged by His Eminence the Metropolitan in the Church here, and would involve our Church here in a condition of that same anarchy under the banner of which church life in Russia exists at present. This is why it is necessary, finally, to organize our church life here in America so that nothing from outside would threaten it. We must create our own firm Church administration, completely insured against possibility of the direct or indirect influence of the Soviet power.

The history of our Church in America teaches us how gradually from a mission to enlighten the natives of Alaska and the Aleutian Islands with Christian faith it developed into a large diocese which was built in accordance with the tradition of the mother church of Russia, taking in all necessary adjustments of the local habits and customs of other branches of the Orthodox Church (Galicians, Moldavians, Bukovins, Serbs, Syro-Arabians, etc.).

In 1917 our American Church in fact severed the organic union with the administration of the Church of Russia which existed heretofore and only casually sometimes do we receive news and desires expressed by Patriarch Tikhon (for example through Rev. Pashkovsky, now Bishop Theophilus, we have received instructions for Metropolitan Platon to become head of our Church).

[fol. 305] We love and always will love the Church of Russia, but now there is lawlessness. We see a number of church groups all of which pretend to be governing the church, and through them, to govern our Church here. They will try, of course, to send their agents here. This

was already done by the "Living Church" which sent Mr. Kedrovsky with full credentials. I shall not conceal from you: Mr. Kedrovsky has taken an injunction against 115 of our churches and if we do not stop him, we might soon see Mr. Kedrovsky as head of our Diocese.

There is only one way out of the situation that has arisen: we must exist independently. In the future no one can and must not either appoint or recall bishops, without the will to do so on the part of the Sobor of the American Orthodox Church. We ourselves establish church authority for ourselves.

V. Rev. Chepeleff

At present we see in Russia two church authorities—one the legal church administration headed by the legally elected Patriarch Tikhon, the other one, the so-called "Holy Synod" headed by Evdokim.

What is the authority of that Moscow Synod which came to power in a revolutionary way into the heart of our Church?

The other day, Evdokim, the President of that Synod, addressed himself officially through the press to all countries, explaining what that Synod was in Russia. He wrote: "In view of the rumors spread abroad that the Russian Church headed by the Holy Synod is a consolidation of different groups, I herewith declare that now there [fol. 306] are no "Living", "Soviet", "Red", Churches but there is only one Holy Apostolic Church, etc."

I declare to this Sobor and request that my words be put into the minutes that the above official document is not in conformity with the facts. I was acquainted personally and through documents with the manner in which Moscow High Church Administration was organized; since last year it has changed its name to the Holy Synod. I declare to this Sobor that that Synod headed by Evdokim is organized from very small groups. The order in which that Synod is being composed is like this: a group of church members, sometimes five or six people (for instance, the group of the present Secretary of the Synod, Mr. Novikov, which calls itself the "Apostolic Church") was registered in the Moscow Soviet, obtained legal existence, and after presenting its charter to the HCA [Highest

Church Administration] demanded that it be represented therein. Thus in the HCA were represented groups such as the "Living Church", the "Apostolic Church", the "Church of Renovation" and the "Labor Church", etc., and in view of its group composition, the HCA adopted the "formula of Eucharistical Unity" in order to guarantee the continuity of their work. The reference made by Evdokim to that fact that this group composing the Synod was approved by their Sobor of 1923 and that it was even re-elected by the same, has no meaning, for the Sobor itself was a convention of a group.

Therefore, the so-called Moscow Holy Synod is but a group and does not represent the will and conscience of the Russian Orthodox Church, but only the will of revolutionary groups insignificant in quantity and quality.
[fol. 307] I am not even mentioning here that by its actions this group organization, which broke the dogmatic traditions of the Church, has brought itself down to the status of an heretical sect.

Patriarch Tikhon, who is heading the Russian Orthodox Church, now called by the Soviets the "Old", "Dominating" and "Counter-Revolutionary" Church, is from the point of view of the communistic ideology the personification of the bourgeois ideology imbued with the ideas of Christianity. It is therefore absolutely inadmissible to the governing political party of the Bolsheviks. The fact that the Soviet power still tolerates Patriarch Tikhon is only because he is an achievable means of influencing opinion at home and public opinion abroad. I have not the slightest doubt that all that the Patriarch now does to administer the Patriarchate he is doing under duress. Over there it is done very simply: he is summoned to the respective commissariat and presented with decrees prepared beforehand which he is "to execute". As everything is done to "consolidate the conquests of the revolution" his refusal to comply with the demands of the Soviet power will be openly called counter-revolution and sabotage. He would then be deprived of any kind of contact with his office.

The Holy Sobor can judge itself how near to normal are those conditions of governmental existence under

which the Patriarch has to realize his right of administration of the Russian Church.

In Russia at the present time there is no freedom of religion more than that—at the present time in Russia there exists the most cruel and merciless persecution of any religion and of its representatives, while they have entirely [fol. 308] enslaved the Orthodox Church and made her a servant of their political interests.

But in this problem of the future of our Orthodox Church in America there exists a very important side which must be mentioned as it is usually used by the "Rights" and the "Lefts" who accuse us of betrayal of our mother church and of her Patriarch.

I have in view that disquieting question which every one of us puts to himself: what would be the Most Holy Patriarch Tikhon's attitude if our American Church, in view of all that is now happening in Russia, should begin to live by herself, pending the establishment of order in the life of the Russian Church.

To answer this natural question allow me to mention to this Sobor two documents which were written by Patriarch Tikhon.

The first document: At the end of 1921, Patriarch Tikhon addressed a circular letter to all diocesan bishops wherein he states in part, "If, in case the borders of the new states which were created on the territory of Russia should be moved or in case of the moving of the front lines, different dioceses should be cut off from the central administration of the church, the ruling bishop of such territory shall receive full authority to organize the administration of the local churches".

In this document what is substantially of importance to our Church in America is that we, actually, for a good many years now, as Mr. Greaves rightly said here, have been cut off from the highest organ of the administration of the Russian Church which is Patriarch Tikhon.

The second document: On November 24th, 1905, Patriarch Tikhon, then Archbishop of North America and the [fol. 309] Aleutian Islands, had presented a report to the old Holy Synod of Russia regarding reforms in the Church. This is what he wrote:—"The North American

Diocese should be reorganized into an Exarchate. In fact it consists not only of different nationalities but of different Orthodox Churches which however united in faith, have different peculiarities in their economic order, in their ritual and their parish lives. In North America can be organized a Holy Exarchate of Orthodox National Churches with their own bishops headed by the Exarch—the Russian Archbishop. It must also be remembered that life in the New World compared to the rule in Europe has its peculiarities which should be reckoned with by our Church. It therefore should receive fuller autonomy (autocephaly) than in other Metropolitan districts in Russia" (Quoted from reports of Diocesan Bishops regarding Church Reform, Part I, St. Petersburg Synodal Press, 1906, page 531).

We therefore see that twenty years ago Patriarch Tikhon understood that outside of economic reasons a practical interest existed to grant to the North American Church a broad autonomy and even autocephaly. (page 530).

Since that time today there are too many practical reasons that compel us to live by ourselves.

* * * * * * *

The debate which followed showed the unanimous desire of the members of the Sobor to keep our American Church from Soviet interference.

There is no doubt, said the Very Rev. Klopotovsky, that we all stand for the Patriarch. But do you know that he would be thankful to us if we separated from him? By [fol. 310] such an act we would relieve his heavy cross. Do not forget that soon we will have to pay the Receiver 5% of our church income. We will not be allowed to drive a nail into the wall of any of our churches without the permission of the Receiver. It has been said that the Patriarch is going to send us a bishop from Russia. We should know that no bishop will be permitted to leave Russia for abroad except a "Living Church" one. Look at the example of the Japanese Church: it is long since autocephalous.

It was submitted to the Sobor that resolutions should

be worked out disposing of the two basic problems facing our church:

(1) To leave Metropolitan Platon as the head of our Church here,

(2) to recognize ourselves as a self-governing Church.

A committee was nominated to word these resolutions. A recess was announced.

At 7:30 p. m. the Chairman opened the evening session of the Sobor . . .

V. E. Greaves suggests that only the resolution parts of the proposed preambles and resolutions be voted upon.

The suggestion of Archpriest L. Turkevich as to voting on the preambles is disapproved and the Sobor proceeds to voting on the resolutions in the order suggested by V. E. Greaves.

Point 1. To recognize that His Eminence Metropolitan Platon may be removed from the Diocese only in a legal manner and not otherwise than with the agreement of the flock that elected him.

This Point 1 is adopted unanimously.

. . . . . .

[fol. 311] Point 1. Temporarily, until the convocation of the All Russian Sobor further indicated in Point 5, to declare the Russian Orthodox Diocese in America a self-governed Church so that it be governed by its own elected Archbishop by means of a Sobor of Bishops, a Council composed of those elected from the clergy and laity, and periodic Sobors of the entire American Church.

Point 1 is adopted by an overwhelming majority with 6 against and 2 abstaining.

. . . . . .

Point 2. To ask filially the Most Reverend Metropolitan Platon to head the administration of the Church and to rule it first with the cooperation of the existing Council of Bishops and Diocesan Council and to elaborate in speedy order a plan for the permanent administration of the American Church for the future, which, in agreement with the foundations of Orthodoxy, must be organized upon the basis of elected Sobors.

Note. The term "speedy order" must be understood in the sense of a definite period of six months.

Point 2 is adopted * * * with 1 abstaining and 2 against.

Point 3. To filially ask the Most Reverend Metropolitan Platon together with all the bishops to approve this resolution and to inform all the Eastern Churches of the reorganization which has taken place.

This Point is adopted * * * with 1 abstaining and 2 against.

[fol. 312] Point 4. Not to break at all the spiritual ties and communion with the Russian Church, but always to pray for her good, give her every cooperation and mention the Most Holy Patriarch as the head of the Russian Mother Church to which the American Church is obligated for her existence.

This Point 4 is adopted unanimously.

Point 5. To leave the final regulation of questions arising from the relationship of the Russian and the American Churches to a future Sobor of the Russian Orthodox Church which will be legally convoked, legally elected, will sit with the participation of representatives of the American Church under conditions of political freedom, guaranteeing the fullness and authority of its decisions for the entire Church, and will be recognized by the entire Oecumenical Orthodox Church as a true Sobor of the Russian Orthodox Church.

Point 5 is adopted unanimously.

Point 6. For participation in the working out of a new constitution of the American Church, as well as for the elaboration and execution together with the Bishops of all acts and measures as shall be needed in the development of the reorganization of the American Church, to elect six delegates from the Sobor, of which 3 from the clergy and 3 from the laity, to whom shall be turned over all the questions indicated in the name of this Sobor, being guided by the resolution of the All-Russian Church Sobor of 1917 and 1918.

* * * * * * * * * *

* * * Point 6 is adopted * * * with two against and none abstaining.

[fol. 313] Point 7. To consider the present resolution effective until there shall take place an All-Russian Church

Sobor, under the conditions indicated above in Point 5, guaranteeing its freedom and legality, and at that Sobor final agreement shall be reached as to the fate of the American Church.

Point 7 is adopted unanimously with one abstaining.

* * * * * * * *

PLAINTIFF'S EXHIBIT 6-A

(Pursuant to stipulation this exhibit, which consists of extracts from the minutes of the Sobor held at Moscow in 1923 and appears in the printed Case on Appeal in *Kedrovsky* v. *Rojdesvensky* at pp. 493-543, is not printed.)

[fol. 314] PLAINTIFF'S EXHIBIT 7 FOR IDENTIFICATION

At a Special Term, Part I of the Supreme Court held in and for the County of New York at the County Court House in said county on the day of June, 1926.

Present: Hon. George V. Mullan, Justice.

JOHN S. KEDROVSKY, as Archbishop of the North American diocese of the Russian Orthodox Greek Catholic Church and as delegate of the Holy Synod of said church, *Plaintiff*,

against

ST. NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH IN NORTH AMERICA, *et al.*, *Defendants*

Plaintiff's motion for a temporary injunction having duly come on to be heard, now upon reading the notice of said motion dated May 28th, 1926, and the affidavit of John S. Kedrovsky, sworn to May 29, 1926 thereto annexed, and the summons and complaint verified May 29, 1926, in support of said motion, and the affidavits of Valerian E. Greaves and of George Gordon Battle, and of H. H. Shepard, all sworn to June 7, 1926, and a copy of the petition of Benjamin Basalyga to the Sixth District [fol. 315] Municipal Court, verified April 15th, 1926, and

a copy of the answer to said petition in said Sixth District Municipal Court, in opposition, and after hearing Ralph M. Frink, attorney for plaintiff in support of said motion, and George Gordon Battle, of counsel for defendants in opposition thereto, and upon filing the opinion of the court, and upon reading the following additional papers received upon a re-argument of the motion, to wit—the affidavit of George Gordon Battle, sworn to June 19, 1926, and the affidavits of Ralph M. Frink, sworn to June 1 and 21, 1926, and the court having upon such re-argument adhered to his original decision and upon filing the opinion of the court upon such re-argument, and the court having required as a condition of granting this motion that the plaintiff consent to an order of preference, so that this action may be disposed of early in the October term, 1926, and plaintiff hereby consenting to such preference, and the plaintiff having filed the security required by law in the sum of $250., it is upon motion of the attorney for the plaintiff, hereby

Ordered that pending the determination of this action the defendant St. Nicholas Cathedral of the Russian Orthodox Church in North America and its several officers, agents, servants, representatives, be and each of them hereby is restrained and enjoined from interfering in any way with the occupancy of said premises known as numbers 13-15 East 97th Street, in the County of New York, by the plaintiff John S. Kedrovsky and by his agents, and from interfering in any way with his or their performing religious services and official activities on said premises.

Enter, J. S. C.

[fol. 316] SUPREME COURT, NEW YORK COUNTY

JOHN S. KEDROVSKY, as Archbishop, etc., *Plaintiff*,

against

ST. NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH IN NORTH AMERICA, *et al.*, *Defendants*

COUNTER ORDER PROPOSED BY DEFENDANTS

Battle, Vandiver, Levy & Van Tine, Attorneys for Defendants, No. 37 Wall Street, Borough of Manhattan, New York City.

Service of the within proposed order is hereby admitted, Ralph M. Frink, per F. J.

Dated at New York, June 24, 1926, Attorney for Plaintiff.

[fol. 317] Sir: Please take notice that the proposed Order of which the within is a copy will be presented to the Honorable George V. Mullan one of the Justices of this Court for settlement at Special Term, Part I on the 25th day of June 1926, at Ten o'clock in the forenoon.

Yours, etc., Battle, Vandiver, Levy & Van Tine, Attorneys for Defendant. Office and P. O. Address, No. 37 Wall Street, Borough of Manhattan, New York City.

To Ralph M. Frink, Attorney for Plaintiff, 233 B'way.

[fol. 318] PLAINTIFF'S EXHIBIT 7-A FOR IDENTIFICATION

SUPREME COURT, NEW YORK COUNTY

JOHN S. KEDROVSKY, ETC., *Plaintiff*,

vs.

ST. NICHOLAS CATHEDRAL, ETC., *et al.*, *Defendants*

MEMORANDUM ON SETTLEMENT OF ORDER

The difference between the two proposed orders are as follows:

Defendants' order omits the recital of the grounds upon which the order is made, required by Section 821, C.P.A. Certainly the court, in making an order, should comply with the requirements of this section.

The other difference is that defendant's proposed order omits from the list of persons in representative capacity enjoined,

"any and all persons asserting any right, title or interest" of the defendants. It would seem proper to make the injunction apply to such persons expressly, in order to avoid any more controversy on such point.

The attention of the Court is called to the fact that defendant has made a motion before Mr. Justice Proskauer to dismiss the complaint on the ground that it does not state facts sufficient to constitute a cause of action; and [fol. 319] Mr. Justice Proskauer has reserved decision. If he should grant this motion, there would be two conflicting orders, since the granting of the motion for a temporary injunction necessarily involves a holding that the complaint is sufficient. It would seem proper, therefore, that if Mr. Justice Proskauer does not regard the matter as having been adjudicated by the decision upon this motion, the signing of the order might be held up for a day or so, so that if Mr. Justice Proskauer should require a new complaint to be served, that might be included among the motion papers in place of the original complaint.

Respectfully submitted, Ralph M. Frink, Attorney for Plaintiff.

21435, 1926.

[fol. 320 PLAINTIFF'S EXHIBIT 7-C FOR IDENTIFICATION

NEW YORK SUPREME COURT, NEW YORK COUNTY

SAINT NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH IN NORTH AMERICA, *Plaintiff*,

against

JOHN KEDROFF, *et al.*, *Defendants*

Before Hon. Bernard Botein, Justice, at Trial Term, Part X, without a jury.

AFFIDAVIT OF RALPH MONTGOMERY ARKUSH

STATE OF NEW YORK,
County of New York, ss.:

Ralph Montgomery Arkush, being duly sworn, deposes and says:

1. I am the attorney for the plaintiff in the above entitled action. At the trial there was admitted and deemed marked in evidence as Plaintiff's Exhibit 7 a paper taken from the files of the County Clerk and at the time supposed to be a temporary injunction order in an action in this court entitled "John S. Kedrovsky, as Archbishop of the North American diocese of the Russian Orthodox Greek Catholic Church and as delegate of the Holy Synod of said church, plaintiff, against St. Nicholas Cathedral of the Russian Orthodox Church in North America, *et al.*, defendants" (herein called the Injunction Action). The County Clerk's file number of said action is 21435/1926. [fol. 321] Later in the course of the trial it appeared that the paper so deemed marked in evidence was unsigned and thereupon it was struck out [*supra*, p. 163]. Counsel for the plaintiff indicate to the Court that they would make a further search for the signed order or evidence of its existence. Such a search was made and the following report is now submitted.

2. Personally, or through my assistants, I have examined the Clerk's minutes and files in the present action, the Injunction Action and two other actions in this Court in which John S. Kedrovsky was plaintiff and the Clerk's

minutes in a proceeding brought in the Municipal Court, Sixth District, by St. Nicholas Cathedral of the Russian Orthodox Church in North America (the present plaintiff, hereinafter called the Cathedral Corporation), as petitioner, against John S. Kedrovsky as occupant and Alexander J. Chechila as undertenant. I have also examined the files and records of the law firms of Zabriskie, Sage, Gray & Todd, Esqs., and Battle, Vandiver, Levy & Van Tine Esqs., both of which firms acted as counsel for the Cathedral Corporation in 1926. I have also had personal interviews with George Gordon Battle, Esq. and Henry H. Shepard, Esq. who were the attorneys in the office of Battle, Vandiver, Levy & Van Tine, Esqs., particularly concerned with the Injunction Action. I have also had a personal interview with George Gray Zabriskie who with his father, the late George Zabriskie, was the attorney in the office of Zabriskie, Sage, Gray & Todd, Esqs., particularly concerned with matters affecting the Cathedral Corporation. The following allegations are made on the basis either of [fol. 322] my personal knowledge or of the examinations and interviews aforesaid.

3. The Cathedral Corporation, as petitioner, brought a forcible entry and detainer proceeding against John S. Kedrovsky as occupant and Alexander J. Chechila as undertenant on April 16, 1926, in the Municipal Court, Sixth District (Index No. 1714). The petitioner alleged a forcible entry on the premises Nos. 13-15 East 97th Street by the defendants Kedrovsky, Chechila and their agents and servants, on April 2, 1926, and the ejection therefrom of one Benjamin Basalyga (alleged to be the agent and custodian of the petitioner) and of the petitioner and prayed for an order removing the occupant, the undertenant, their agents and servants from possession. Zabriskie, Sage, Gray & Todd were attorneys of record for the petitioner and George Gordon Battle trial counsel. The attorney of record and trial counsel for the defendants was Ralph M. Frink. The defendants filed an answer setting up various defenses centered principally on the claim of Kedrovsky to be the ruling archbishop of the North American diocese as established by the judgment in the case of *Kedrovsky et al.*, v. *Rojdestvensky et al.*, affirmed by the Court of Appeals on March 30, 1926. The proceeding came on for

trial before Mr. Justice Blau on May 14, 1926. After the petitioner had put in its proof and rested and a motion of the defendants to dismiss had been denied the trial was adjourned; before the adjourned date Mr. Justice Blau adjourned his term in the Sixth District so that it became necessary to restore the case to the calendar for a new trial. On May 26, 1926, the petitioner's attorneys sent a [fol. 323] stipulation to the defendants' attorney restoring the case to the calendar but this stipulation was never returned and no further steps were taken in the proceeding.

On June 2, 1926, a notice of motion dated May 28 for a temporary injunction in the Injunction Action, the complaint and supporting affidavit of John S. Kedrovsky verified May 29 and the summons were served on Valerian E. Greaves, who was named as an individual defendant and was also an officer of the Cathedral Corporation. All of the individual defendants were or had been trustees of the Cathedral Corporation. The complaint alleged that the plaintiff Kedrovsky was the archbishop of the North American diocese entitled to occupy St. Nicholas Cathedral; that the judgment in the action of *Kedrovsky* v. *Rojdestvensky* was binding upon the parties to the Injunction Action as parties to the former action or persons in privity to the parties thereto and that the defendants had interfered with the plaintiff's occupancy of the premises and were still attempting and threatening so to do. The prayer for relief was as follows:

> "Wherefore plaintiff demands judgment against the defendants and each of them, enjoining and restraining said defendants, their several trustees, officers, agents, servants and representatives and any and all persons asserting any right, title or interest of the defendant corporation in or to such premises, from occupying the said premises mentioned in the complaint and from interfering in any way with the occupancy of the same by the plaintiff or with his performing religious services and official activities of said [fol. 324] premises, and that plaintiff have judgment against the defendants for such other and further relief as may be just, together with a temporary injunc-

tion to such effect, pending the determination of the action, and costs and disbursements of the action."

No mention was made in the complaint of the Municipal Court proceeding but in the affidavit supporting the motion for a temporary injunction that proceeding was referred to and the statement made that it had not yet been tried. In an opposing affidavit of Mr. Greaves verified June 7, 1926, it was stated:

"The plaintiff is evidently trying to get this court to make a blanket injunction order based upon the bringing of that summary proceeding which plaintiff could then claim had the effect of inferentially restraining the defendants from going on with the summary proceeding."

The motion for temporary injunction appeared as No. 84 on the Special Term, Part I, calendar before Mr. Justice Mullan on June 7, 1926 (N. Y. L. J., p. 1048).

On June 12, 1926, the following decision by Mr. Justice Mullan was published (N. Y. L. J., p. 1141):

"I have reached the conclusion that the contention of plaintiff's counsel is well founded and that the only fair and equitable way of disposing of the entire body of controversy is to throw the whole matter into the Supreme Court, where all the issues can be decided. [fol. 325] In order, however, that the determination of defendant's claim to right of possession be not too long put off, I shall make it a condition that the plaintiff consent to an order of preference, so that this action may be disposed of in the early part of October next."

On June 12, 1926, the plaintiff's attorney served a proposed order with notice of settlement on June 15. On June 14 Mr. Battle wrote to Mr. Justice Mullan asking for reargument or, if his request should be denied, asking for two days within which to submit a counter proposal of injunction order. On June 15 Judge Mullan's secretary wrote to counsel setting the reargument for June 21. On June 14 United States Fidelity and Guaranty Company executed an undertaking on injunction in the sum of $250.

By notice dated June 19, 1926, returnable June 24, the defendant Cathedral Corporation moved to dismiss the complaint for insufficiency.

The reargument of the motion for temporary injunction was had on June 21 and the decision of Mr. Justice Mullan, granting the reargument and adhering to his original decision appeared on June 23 (N. Y. L. J., p. 1302). On June 24 the defendants' attorneys served a counter order with notice of settlement on June 25. The counter order read as follows:

[The counter order is printed above as Plaintiff's Exhibit 6 for identification.]

On June 24 the motion to dismiss the complaint came on before Mr. Justice Proskauer at Special Term, Part III. In a memorandum opposing the motion Mr. Frink stated:

> [fol. 326] "Mr. Justice Mullan granted a motion for a temporary injunction in this action under section 877, C. P. A. The papers are still before him, as the order has not yet been signed."

Decision on the motion to dismiss was reserved.

In a memorandum on settlement of the injunction order Mr. Frink stated:

[The memorandum is printed above as Plaintiff's Exhibit 7-A for identification.]

Under date of June 28, apparently at the suggestion of Mr. Justice Proskauer, a stipulation was signed that the motion to dismiss the complaint be withdrawn, that the plaintiff have before July 6 to serve an amended complaint and that on July 13 reargument of the motion for temporary injunction be had before Mr. Justice Mullan. The withdrawal of the motion to dismiss was approved by Mr. Justice Proskauer on June 30, 1926.

Evidently Mr. Justice Mullan signed and filed the injunction order the next day, since the first entry in the Clerk's minutes of the Injunction Action is dated July 1, 1926, and reads "Order 7" (Plaintiff's Exhibit 8 in the present action). The number of filed papers, as so noted in the Clerk's minutes, to wit seven, corresponds with the number which would have been filed by Mr. Justice Mullan

after signing an order granting a temporary injunction, if it be assumed that papers bound and backed together were counted as one paper by the person in the Clerk's office who made the entry in the minutes. I am advised by the Clerk's office that papers bound and backed together are often counted as one for the purpose of entry in the Clerk's [fol. 327] minutes. On this assumption the filed papers were as follows: (1) notice of motion with annexed affidavit, summons and complaint, (2) answering affidavits of June 7 and Municipal Court pleadings, (3) answering affidavit of June 19, (4) replying affidavit of June 7, (5) replying affidavit of June 21, (6) decision, (7) order.

The Law Journal of July 2 (p. 1408) carried a notice of the signing by Mr. Justice Mullan at Special Term, Part I, of an order in "Kedrovsky *v.* St. Nicholas Cathedral &c."

On July 1, 1926, an amended complaint was verified. The prayer for injunctive relief was in substantially the same terms as in the original complaint.

A notice of motion by the Cathedral Corporation to dismiss the amended complaint for insufficiency, dated July 20, 1926, came on for argument before Mr. Justice Crain at Special Term, Part III, on July 27. In a supplemental memorandum dated July 27, 1926, submitted on behalf of the defendant Cathedral Corporation in support of the motion to dismiss the amended complaint the following statement was made:

> "Plaintiff also urged on the argument that the granting of the motion for a temporary injunction in this action forecloses the defendants from questioning the sufficiency of the complaint as this question must of necessity have been decided by Mr. Justice Mullan in the motion for the temporary injunction. The facts in this phase of the situation are that after the determination of the motion for a temporary injunction, the present moving party attacked the complaint for in- [fol. 328] sufficiency and was sustained by Mr. Justice Proskauer. However, in view of the Judge's early departure for Europe, he suggested the withdrawal of the motion for judgment and the granting of leave to the plaintiff to amend and the subsequent argument

on the question of sufficiency of the amended complaint, all by stipulation. It was further suggested by Mr. Justice Proskauer that the proposed order presented by counsel in the temporary injunction motion be held in abeyance by Mr. Justice Mullan pending the further argument on the sufficiency of the amended complaint. To the surprise of counsel not only for the defendant, but for the plaintiff, Mr. Justice Mullan signed one of the orders submitted, granting a temporary injunction. * * *"

Mr. Justice Crain made and filed an order denying the motion on July 29, 1926. His memorandum opinion was as follows:

"This is a motion for an order dismissing the amended complaint herein on the ground that it appears on the face of the said amended complaint that it does not state facts sufficient to constitute a cause of action. It is brought by one who asserts that he and another have the exclusive right to occupy premises 13-15 East 97th Street and that such premises are now in part occupied by the defendant, whose continued partial occupation the plaintiff seeks by this action to prevent by injunction. If the complaint contains allegations which if true show that plaintiff and such other have such exclusive right of occupancy and if the complaint contains allegations which if true [fol. 329] show that the defendants are occupying such premises without the express or implied consent of the plaintiff and such other and the remedy for such unlawful occupancy is a judgment enjoining the defendants from so occupying the premises, the complaint states a cause of action. It contains what purport to be statements of fact from which it would follow that the plaintiff, because of his ecclesiastical office and the person holding the office of dean and their agents and permittees have the sole and exclusive right of occupancy, and it does allege that the defendants are in partial occupation and it negatives that they are agents or permittees of the plaintiff. The complaint contains unnecessary and confusing allegations and some that militate against the alleged right

asserted by the plaintiff, but the motion to dismiss is denied without costs and defendants' time to answer is extended until ten days after the service upon their attorneys of the order entered on the decision of this motion with notice of entry."

N. Y. L. J., July 30, 1926, p. 1652.

The entry in the Clerk's minutes as of July 29 is "Order 3" doubtless referring to the (1) notice of motion to dismiss amended complaint with annexed amended complaint, (2) decision, (3) order.

On July 31 Mr. Battle wrote to Judge Crain requesting reargument which was granted on August 3 and the reargument was had on August 6.

[fol. 330] The undertaking on injunction which had been executed on June 14 by United States Fidelity and Guaranty Company was approved by Mr. Justice Valente on August 26, 1926, and filed on the following day. The filing of the undertaking is the third and last item noted in the Clerk's minutes (the fourth and fifth items which appear on Plaintiff's Exhibit 8 referred to papers in another action and the minutes now show that these papers have been transferred to another file). According to a letter dated January 14, 1941, written by Charles Benowitz, attorney for Nicholas Kedroff, the son and alleged successor in office of John S. Kedrovsky, the fifteenth annual premium on said undertaking had been paid to the surety company.

On November 13, 1926, Mr. Battle wrote to Judge Crain inquiring as to the disposition of the motion to dismiss the amended complaint and received from the Judge a reply dated November 17 stating:

"As you know, I granted at your request a reargument and you came to my Chambers and the reargument, as I understood it, was then had. I waited for some time for the reception of a brief from you and then, I think, after two or three weeks, not hearing from you I concluded to adhere to my original decision and the papers were returned to the County Clerk's office."

On January 31, 1927, Mr. Battle wrote to the younger Mr. Zabriskie as follows:

> "In regard to the reargument of the motion to dismiss the complaint in this matter, you will recall that [fol. 331] this reargument was had before Mr. Justice Crain, at his Chambers, on August 6, 1926. The next day (August 7, 1926) I wrote your father a letter, a copy of which I enclose for your information. I understood at the argument that we were to submit no further briefs. I thought the Court was going to decide the matter upon the oral argument, and I did not think a brief was necessary in addition to the briefs already filed, as we had submitted a very complete memorandum in support of our motion. As we did not hear anything further, I wrote Mr. Justice Crain, on November 13th a letter, a copy of which I also enclosed and received from him a letter dated November 17, 1926, a copy of which I herewith hand you. I think it is quite clear that Mr. Justice Crain intends to adhere to his original decision. He reached that decision after our oral argument. I do not think that the submission of a brief would have any effect upon him, nor do I think the present submission of any brief would have any effect.
>
> In my judgment, therefore, I think it would be futile to make any effort to revive the motion. I should be very glad, however, to have your views in the matter and to take any action that you and your father might think wise."

In reply Mr. Zabriskie wrote to Mr. Battle on February 10, 1927, as follows:

> "I have gone over with my father the question raised by your letter of January 31st. We agree with you that it would probably not be worth while [fol. 332] to go any further with the motion to dismiss the complaint before Judge Crain. It seems to us that there are three possible courses now open to the Cathedral. The first would be to enter some kind of an order upon Judge Crain's decision on the reargument adhering to the decision embodied in his

previous order and then appeal from it. Without going into the question carefully, however, I should think it doubtful whether such an order could be so framed as to be appealable. If that course is not taken you could serve an answer and obtain a bill of particulars of the complaint. It seems possible that such bill of particulars might show more explicitly than the complaint does that the only interference plaintiff could prove would be the summary proceeding in the Municipal Court to remove him for forcible entry, which has been pending and in obeyance ever since Judge Mullan granted the temporary injunction which was not appealed from. Accordingly it might turn out that a further motion could be based upon the complaint and bill of particulars under Section 476 of the Practice Act, upon which the previous decisions of Judges Mullan and Crain would not be binding. My father and I are inclined to the opinion that this would be the best course to follow. If, however, you should deem it better after answering to bring the case on for trial, we have no doubt your judgment would be sound. The end in view is, of course, to get rid of the temporary injunction which I supposed until recently had been appealed from, so that the summary [fol. 333] proceeding in the Municipal Court may be resumed. I do not see how, if that proceeding is permitted to be tried, it can help resulting in a final order removing Kedrovsky from the Cathedral. He might be able to get back eventually under the decision of the Court of Appeals in his main suit, but possession is nine points of the law, and it might be possible to raise new obstacles. We hope, therefore, that you will soon be able to decide upon the best course to pursue to get rid of the temporary injunction, and may be successful in that object."

In a letter dated March 5, 1927, from Mr. Battle to the younger Mr. Zabriskie the following appears:

"You will, I know, pardon my delay in answering your letter of February 10th * * *

In regard to the question raised in your letter, I think it would be wise to serve an answer to the com-

plaint and then get a bill of particulars. We could then determine whether it would be wise to make a motion upon the complaint and bill of particulars under Section 476 of the Practice Act. If we did not make such a motion, the other remedy would be to bring the action on for trial. I am not, however, very sanguine of success in obtaining a court order to eject Kedrovsky from the Cathedral. While our case for doing so is technically strong, still in view of the fact of the decision of the Court of Appeals, I am afraid that the Courts will find some way to avoid putting him out.

[fol. 334] I shall be glad to discuss these matters with your father and yourself whenever you desire."

In the light of the foregoing it is clear that an injunction order was filed on July 1, 1926, and was at all times in effect during the lifetime of John Kedrovsky. It is also clear that the injunctive provisions of the signed order were identical with those contained in the counter order which was deemed marked in evidence as Plaintiff's Exhibit 7 and then struck out except that the signed order also enjoined "every and all persons asserting any right, title or interest" of the defendants.

Wherefore, I respectfully pray that the unsigned counter order again be deemed in evidence as Plaintiff's Exhibit 7 and that Mr. Frink's "Memorandum on Settlement of Order", which is in the Clerk's file and specifies the differences between the two proposed orders, be received in evidence and deemed marked Plaintiff's Exhibit 7a.

[Sworn to by Ralph Montgomery Arkush on November 28, 1947.]

[fols. 335-337] PLAINTIFF'S EXHIBIT 8

File No. 21433:

Clerk's Minutes—No. 17—1926, 20801 to 23399, County Clerk's Office, 21435.

John S. Kedrovsky

vs.

St. Nicholas Cathedral etc.

1926 July 1, Order 7, 1926 July 29, Order 3, 1926 Aug 27, Bond, 1927 Mch 22, No of Exceptions, 1927 Mch 22, No of Appeal.

[fol. 338] PLAINTIFF'S EXHIBIT 11

This Indenture, made the 17th day of April nineteen hundred and twenty-five, between the Russian Orthodox St. Nicholas Church in New York, a domestic corporation of 15 East 97th Street, Borough of Manhattan, City, County and State of New York, party of the first part, and the St. Nicholas Cathedral of the Russian Orthodox Church in North America, a domestic corporation, of 15 East 97th Street, Borough of Manhattan, City, County and State of New York, party of the second part,

Witnesseth, that the party of the first part, pursuant to a statute entitled "an Act to incorporate the St. Nicholas Cathedral of the Russian Orthodox Church in North America" passed by the legislature of the State of New York and approved by the Governor of the State on the 8th day of April, 1925 (chapter 463) and in consideration of One Dollar, lawful money of the United States, paid by the party of the second part, and other good and valuable considerations, does hereby grant and release unto the party of the second part, its successors and assigns forever,

All those certain three lots, pieces or parcels of land, situate, lying and being in the Borough of Manhattan, of the City of New York, which taken together are bounded and described as follows:

Beginning at a point on the Northerly side of East Ninety-Seventh Street, distant two hundred and fifty

(250) feet, easterly from the intersection of the Northerly side of Ninety-Seventh Street with the Easterly side of Fifth Avenue, thence northerly parallel with Fifth Avenue, One hundred (100) feet eight and one-
[fol. 339] half (8½) inches, more or less to the middle line of the block; thence Easterly along said middle line of the block and parallel with Ninety-Seventh Street, seventy-five (75) feet; thence southerly and parallel with Fifth Avenue One hundred (100) feet eight and one-half (8½) inches more or less to the Southerly side of Ninety-Seventh Street; thence Westerly along said Northerly side of Ninety-Seventh Street, seventy-five (75) feet to the point or place of beginning.

Being the same premises heretofore conveyed to Charles B. Curtis by Joseph Kolbfleisch by deed dated July 16, 1899, and recorded in Liber 2255 of Conveyances, page 101, on August 1, 1899. Said premises being now known as #15 East 97th Street, and being the same premises described in Liber 191 of Conveyances, page 166, in the office of the Register of the County of New York, and being the same premises described in Liber 323 of Conveyances, Page 60, in the Office of said Register.

Together with all right title and interest of the grantor in and to any strips or gores of land adjacent to or adjoining said premises.

Together with the buildings of the Church and rectory erected on said land, appurtenances and all the estate and rights of the said party of the first part in and to said premises.

Together with all personal property belonging to the party of the first part and being in the above-described premises.

To have and to hold the above-granted premises with the said party of the second part, its successors and assigns forever,

[fol. 340] Subject to all provisions set forth in the above-said Act approved by the Governor of the State of New York on the 8th day of April, 1925 (chapter 463).

Subject also to such mortgage or mortgages as may lawfully appear on the record.

And the party of the first covenants as follows:

First. That the party of the first part is seized of the said premises in fee simple, and has good right to convey the same;

Second. That the party of the second part shall quietly enjoy the said premises;

Third. That the said premises are free from encumbrances;

Fourth. That the party of the first part will execute or procure any further necessary assurance of the title to said premises;

Fifth. That the party of the first part will forever warrant the title to the said premises.

In Witness Whereof, the party of the first part has caused its corporate seal to be hereunto affixed and these presents to be signed by its Trustee, Hon. Michael M. Oustinoff, the day and year first above written.

Witness: Valerian E. Greaves.

Russian Orthodox St. Nicholas Church in the City of New York, By Michael M. Oustinoff, Trustee, Russian Consul General, New York [Seal].

[fols. 341-342] *Duly sworn to by Michael M. Oustinoff, Jurat omitted in printing.*

[fol. 343] PLAINTIFF'S EXHIBIT 13

(Pursuant to stipulation this exhibit, which is a telegram dated March 22, 1945, from Metropolitan Theophilus to Ralph Arkush, is not printed.)

PLAINTIFF'S EXHIBIT 14

(Pursuant to stipulation this exhibit, which consists of the minutes of a special meeting of the board of trustees of the plaintiff corporation held on July 10, 1945, is not printed.)

PLAINTIFF'S EXHIBIT 15

(Pursuant to stipulation this exhibit, which is a copy of the act approved April 10, 1945 (L. 1945, c. 693), enacting Article 5-C of the Religious Corporations Law, is not printed.)

PLAINTIFF'S EXHIBIT 15-A

Thus receiving the right to legal existence (official registration, May 18-31, 1927), we clearly take account of the fact that with rights we also take on obligations with reference to the authorities who give us these rights—and thus I have taken upon myself, in the name of the whole of our Orthodox old-church (Tikhon) hierarchy and flock, to register before the Soviet authorities our sincere readiness to be fully law-abiding citizens of the Soviet Union, loyal to its Government, and definitely to hold ourselves aloof from all political parties or enterprises seeking to harm the Union.

[fol. 344] But let us be sincere to the end. We cannot be silent about the contradiction which exists between us Orthodox and the Communist Bolsheviks, who govern our Union. They set as their purpose struggle with God and His power in the hearts of the people. We on our part see the whole sense and whole aim of our existence in confession of faith in God and strengthening of the faith in the hearts of the people. They recognize only the materialistic interpretation of history, and we believe in the providence of God.

In spite of all this, we are convinced that the Orthodox Christian, sacredly observing his faith and living according to its precepts, for this very reason will be, always and everywhere, a desirable and exemplary citizen of any state, including that of the Soviets, in whatever area of life he is called upon to work: in the factory, in village or city, in the army or mine, etc. Should the state demand rejection of property, should it be necessary to lay down his life for the common good, should it be to show an example of temperance, honesty, earnestness in serving society—all this indeed the Christian is taught by his faith. In any case, since not only Communists but people of re-

ligious faith are citizens of the Union, in the leading ranks of these citizens must be found every Orthodox Christian, especially as the vast majority of the population is Orthodox.

The above is a declaration issued by Metropolitan Sergius on June 10, 1927, as quoted in "People, Church and State in Modern Russia", by Paul B. Anderson, published in 1944 by The Macmillan Company, at pp. 95-96.

[fol. 345] PLAINTIFF'S EXHIBIT 15-B

We conduct propaganda and shall conduct propaganda against religious prejudices. The laws of the country are such that each citizen has the right to confess any religion. This is a matter of conscience for each one. Exactly for this reason we carried through the separation of Church from the state and, proclaiming freedom of confession, we also preserved for each citizen the right to struggle against any religion by means of persuasion, propaganda and agitation. The Party cannot be neutral with regard to religion, and it conducts antireligious propaganda against any and all religious prejudices because it stands for science, while religious prejudices go against science, since every religion is something contrary to science. Such instances, as in America, where recently they condemned Darwinists, would be impossible with us, because the Party conducts a policy of complete upholding of science.

The Party cannot be neutral with regard to religious prejudices and will conduct propaganda against these prejudices because this is one of the sure methods of undercutting the influence of the reactionary clergy, supporting the exploitive classes and preaching subordination to these classes. The Party cannot be neutral with regard to the bearers of religious prejudices, with regard to the reactionary clergy, poisoning the minds of the toiling masses. Have we oppressed the reactionary clergy? Yes, we have oppressed them. The trouble is only that they are not yet fully liquidated. Antireligious propaganda is the means which must carry through to the end the work of liquidating the reactionary clergy. There are sometimes cases where Party members hinder the full development of anti-

religious propaganda. If such members of the Party are [fol. 346] rejected, that is very good, because there is no place for such "communists" in the ranks of our Party.

The above is a statement made by Stalin in his conversation with members of the First American Trade Union Delegation, September 9, 1927 (*Lenin: Izbrannie Proizvedenia,* Vol. I, 1939. 1901. Moscow) quoted at pp. 101-102 in "People, Church and State" by Paul B. Anderson.

PLAINTIFF'S EXHIBIT 16

THE PATRIARCHAL UKASE OF FEBRUARY 16, 1945

Russian Orthodox Greek Catholic Church of North America

59 East 2nd Street, New York 3, N. Y.

Approved St. Peter and Paul's day 1945, Metropolitan Theophilus.

RUSSIAN ORTHODOX GREEK CATHOLIC CHURCH OF NORTH America

To the Clergy and Lay People of the Russian Orthodox Church of America:

The Patriarchal Ukase of February 16, 1945

You have heard the news that the Bishops Council at Chicago on May 22-24, 1945, considered the Patriarchal Ukase of February 16, 1945, and decided that the terms proposed were not acceptable.

[fol. 347] In order that this decision may be understood in its proper perspective a discussion of the historical background and of the terms of the Ukase should be had.

Background

In 1924 the unity of the North American diocese was threatened, and the titles to its properties were endangered, by the attacks of John Kedrovsky, a representative of the schismatic group known as the Renovated Church.

That faction, which had attempted to seize control of church affairs in Russia and pretended to be the central church authority, had issued documents purporting to appoint Kedrovsky the Archbishop of the North American Diocese. A pseudo-Sobor, which had been convened by this group in 1923, declared "capitalism to be a mortal sin and a battle with capitalism to be holy to Christians". That "Sobor" also announced Patriarch Tikhon "unfrocked of his orders and monkhood". This schismatic group, if not actually created with the assistance of the Soviet government, certainly basked in its favor for a time. Most of the leaders of the Patriarchal Church had been killed, imprisoned or exiled, or had fled abroad. The American Church, by the very force of circumstances, had been cast adrift.

In this plight, the American Church had but one alternative, namely, to set up its own organization. The Sobor of the Russian Orthodox Church of America, held in Detroit in 1924 declared the Church self-governing, and decided:

> "* * * that it shall be governed by its elected Archbishop through a Council of Bishops, a [Metropolitan] [fol. 348] Council composed of persons elected from the clergy and laity, and through periodical Sobors of the American Church.
>
> * * * * * * *
>
> 4. Not to sever at all the spiritual ties and communion with the Russian Church, but always to pray for its welfare, give it complete cooperation, and to mention [in the services] the Holy Patriarch as the head of the Mother Russian Church to which the American Church owes its existence.
>
> 5. That the final decisions on the problems arising from the interrelations of the Russian and American Churches is left to a future legally called, legally constituted Sobor of the Russian Orthodox Church whose sessions shall be conducted with the participation of the representatives of the American Church under conditions of political freedom assuring fullness and authority to its decisions on behalf of the whole Church, and which [Sobor] shall be recognized by the whole

Universal Orthodox Church as a true Sobor of the Russian Orthodox Church.

* * * * * * *

7. To consider the present decisions effective until there shall be held a Sobor of the Russian Orthodox Church under the conditions set forth above in paragraph 5 which guarantee it freedom and validity, and until final agreement has been reached at that Sobor on the fate of the American Church."

[fol. 349] The American Church followed these declared principles and continued its activities as a self-governing body.

In 1933 the acting *locum tenens* of the Patriarchal Throne, Metropolitan Sergius, sent Bishop (now Exarch) Benjamin to this country. The Patriarchal Church, although not restored to its full rights, had made its peace with the Soviet government. In the name of the Patriarchate, the Exarch demanded from the American clergy a pledge of loyalty to the Soviet government. When the pledge was refused, Metropolitan Sergius laid a suspension upon the American Church. It was this act of suspension which broke off spiritual relationship between the two churches. The action was taken with no advance notice, without the preferment of charges and without permitting any opportunity to the American Church to be heard.

In 1934, upon the death of Metropolitan Platon, the American Church, at the Sobor in Cleveland, elected the present Metropolitan. Under his leadership, the American Church has grown and prospered. With trifling exceptions, the clergy and laity have remained loyal to the duly elected Metropolitan.

In 1937 the American Church, at the Sobor in New York, adopted the rules for the administration of the American Church under the name of Russian Orthodox Greek Catholic Church of North America. The Church was legally incorporated under that name. The bishops who had been sent here by the council of refugee bishops sitting in Yugoslavia acknowledged the jurisdiction of Metropolitan Theophilus and were assigned dioceses under him. In order to bring about this result and create harmony in the American Church, it was necessary for it to

[fol. 350] enter into a concordat with the Russian Churches of Western Europe, the Far East and the Balkans.

Beginning in 1941 when Hitler attacked Russia, an increasing amount of news about the Patriarchal Church was released from Moscow. It seemed, in form at least, that the mother church was being restored to a position of dignity and usefulness. Finally, friends of religion everywhere rejoiced to hear that, with the permission of the Soviet Government, a Bishops Council of the mother church had been convened and had named a Patriarch. Many people began to hope that the suspension which had been placed upon the American Church might be lifted. The clergy of the American Church mentioned again the name of the Patriarch of Moscow and All Russia in the divine services. When Patriarch Sergius died, the American Church sent a telegram of condolence to the *locum tenens* of the patriarchal throne. This telegram was courteously acknowledged on behalf of the Patriarchal Synod. The time appeared to be ripe for a discussion of the terms on which the two churches might be reunited. The subject began to be studied in the circles of the American Church.

Then, with no advance notice, came an invitation for the American Church to be represented at the All Russian Sobor to be held in Moscow on January 31, 1945. There was no time to convene an All American Sobor or even a Bishops Council to choose and instruct the delegates. Metropolitan Theophilus, after some consultation, appointed as delegates Bishop Alexy, Archpriest Joseph Dzvonchik, Secretary of the Metropolitan Council, Archpriest Nicholas Metropolsky, and Ralph Montgomery Arkush, Esq., a lay [fol. 351] member of the Church and the legal adviser of the Metropolitan Council. In the minimum time permissible for the issuance of passports, the granting of visas, completion of inoculations, etc., Bishop Alexy and Fr. Dzvonchik left New York for Moscow. The Soviet government provided the transportation from Alaska on. The other two delegates were to follow in a few days. Before they could leave, the Soviet government without warning cancelled the visa which had previously been granted to Attorney Arkush. The assigned reason was that entry into the Soviet Union for attendance or participation in the Sobor was permitted only to clerical persons. (It is

to be noted that a layman, an attorney, attended the Sobor from Yugoslavia and eighteen laymen attended as delegates from dioceses in the USSR.) Bishop Alexy and Fr. Dzvonchik, while midway across Siberia, after some delays, were informed that the weather required that they be transferred from their plane to a train. They arrived in Moscow ten days after the Sobor had adjourned.

The newly elected Patriarch and the Holy Synod received the American delegates courteously and hospitably. During divine services they stood within the sanctuary, not being invited to participate as clergymen in the ceremony. They presented to the Patriarch a written report on the conditions of church life in America and a written request for lifting of the suspension on terms of autonomy appropriate to the American district. No opportunity for discussion of any of these matters was given to the American delegates. Several days after they had presented their documents, the Patriarch summoned them to his presence [fol. 352] and read to them the Ukase of February 16, 1945, which had already been signed, sealed and numbered. The Patriarch asked them to deliver the Ukase to their Metropolitan and, without more ado, gave them his blessing.

Terms of the Ukase

In the light of this background, the terms of the Ukase may now be examined. The Ukase:

(a) Establishes a new metropolitan district, including parishes not now within the jurisdiction of the American Church, such as a few South American parishes, with a Metropolitan bearing the title of Patriarchal Exarch of All America and Canada;

(b) Calls for an All American Sobor to be convened, not later than the middle of the period between Easter and Pentecost [May 8-June 25], 1945, under the chairmanship of Archbishop Alexy of Yaroslav and Rostov;

(c) Requires the Sobor to express the decision of the American diocese to be reunited with the mother church;

(d) Requires the Sobor to declare the renunciation by the American Church of political activities against

the USSR and give corresponding orders to all the parishes;

(e) Provides that the Sobor by not less than two-thirds vote elect a Metropolitan and present the one chosen for confirmation by the Moscow Patriarchate; [fol. 353] (f) Recommends to the Sobor as candidates Metropolitan Benjamin and Archbishop Alexy, without limiting the Sobor in its right to nominate and elect its own candidate;

(g) Reserves to the Patriarchate the right to refuse confirmation of the chosen candidate if considered unsuitable for any motivated reasons whatsoever;

(h) Reserves to the Patriarchate the right to hear appeals by bishops and clergy from decisions of the American Church, to confirm candidates for bishop and to reward the clergy with higher titles, reserves other rights (unspecified) and intimates that the Metropolitan Exarch, together with the council of local bishops, may be given some extended powers by the Patriarchate.

Discussion

First and foremost it must be emphasized that the American Church considers itself as part of the Russian Church and desires that the suspension be lifted. It appreciates the courtesies which were extended to its delegates in the traditional Orthodox spirit. It ascribes greater importance to such Christian attitude of mutual dealing than to the technicalities to be observed in the lifting of the suspension. On the other hand, the tone and text of the Patriarchal Ukase disclose that the advisers of the Patriarch and the Holy Synod have little conception of the conditions of church life in this country, and of the atmosphere of religious and political freedom in which the American Church has developed.

[fol. 354] I

A New Metropolitan District

The establishment of a new metropolitan district is pointless. It is obviously a device for justifying a new election of a Metropolitan. The present district has existed, first as a mission, then as a missionary diocese, then as a dio-

cese and then as a metropolitan district, for more than a century and a half. The addition of a trifling number of South American parishes, or half a dozen or so parishes in North America that have never been included within the present district, is too insubstantial a change in the character of the district to warrant the thoroughgoing reorganization contemplated by the Ukase. Can it be, perhaps, that the Patriarchal Synod is not fully informed as to the statistics of the American Church? There is reason to believe that only recently the office of the Patriarchal Synod was not in possession of the information that the number of parishes in America which recognize the jurisdiction of Exarch Benjamin is 13. The number of parishes which recognize Metropolitan Theophilus is 358.

There is no reason for changing the name of the present district or the title of its head. These changes would create confusion as to property titles and other legal matters.

II

Convocation of an All American Sobor and Designation of Its Presiding Officer

The time prescribed by the Ukase for the convocation of an All American Sobor has now expired, so that no [fol. 355] mention need be made of the shortness of the period permitted for the preparation for such a Sobor. But even if that period were extended, and the regulations of the United States Office of Defense Transportation permitted, only imperative necessity would justify the holding of a Sobor under present war time conditions of travel and employment. Many active churchmen are in the armed forces. To discuss inflexible conditions which are obviously unacceptable is not a sufficient excuse for the convocation of a Sobor at this time. If reasonable conditions can be agreed on as the result of negotiation, a tentative concordat can be entered into by the Metropolitan with the approval of the Bishops Council and the Metropolitan Council and may be ratified by an All American Sobor when war time conditions have ameliorated.

The Ukase names the Archbishop of Yaroslav and Rostov to preside at the American Sobor. Under the rules for the administration of the Russian Church in America

adopted at the Sobor held in New York in 1937, an All American Sobor is convoked by and presided over by the Metropolitan. There is no canonical or practical reason why Metropolitan Theophilus should be displaced as the presiding officer of the Sobor when it is convoked.

III

Declaration of Renunciation of Political Activities Against the USSR

On October 10, 1944, the Council of Bishops of the American Church adopted the following resolution:

> [fol. 356] "The Council of Bishops finds it necessary to recommend to the clergy of the Metropolitanate, for the general welfare, not to touch upon political questions and not to make any public speeches on the subject, especially from the pulpit."

On the whole this recommendation has been meticulously followed. The American Church will hold to the same policy in the future. Nevertheless, the Russian Church in America exists in an atmosphere of religious and political freedom. Every citizen of the United States and of Canada has the right of freedom of speech. He may criticize his own government or any other government, so long as he does not go beyond certain limits which have been fixed by statute or decisions of the courts. It would be inconsistent with the duties and obligations of loyal American and Canadian citizens, and contrary to the traditional atmosphere of freedom of speech and political action in these countries, for the Russian Church in America to give the pledge of loyalty to a foreign power which is implicit in the demand of the Patriarchal Ukase.

IV

Election of a Metropolitan and Confirmation by Moscow Patriarchate

There is no present vacancy in the office of Metropolitan of the North American District. The addition of a few South American parishes, or North American parishes

not yet a part of the North American District, is too obviously transparent a device to justify the holding of a new election.

[fol. 357] Canonically and in accordance with the constitution of the mother church adopted at the Great Sobor held in Moscow in 1917-1918, the Patriarchate has the right to approve or disapprove the election of a bishop, but such right of veto cannot be exercised except on strictly canonical or moral grounds. Before requiring a new election, it is incumbent upon the Patriarchate to make charges against the present Metropolitan and to give him a fair hearing and trial of such charges.

The requirement of the Ukase that the vote for Metropolitan be by two-thirds "in accordance with American laws" appears to have no canonical or constitutional basis.

The recommendation by the Patriarchate of Exarch Benjamin and Archbishop Alexy as candidates appears to be without precedent in Russian Church history, even if there were any valid reason for holding a new election.

V.

Autonomy of the American Church

The Ukase mentions the possibility that "some extended powers" may be given by the Moscow Patriarchate. This, of course, is quite unsatisfactory. The precise nature of the relationship between the two churches should be defined in advance. This is particularly necessary in view of the precarious situation of the mother church, existing as it does by sufferance of a totalitarian regime.

The Ukase reserves to the Moscow Patriarchate the right to confirm candidates for bishop, the right to reward the clergy with higher titles, the right of appeal as regards bishops and clergy and other rights (not specified). The [fol. 358] right of appeal should be limited to bishops. Otherwise, every case of discipline of the clergy may involve an appeal to Moscow, a practice which could readily be abused and become ruinous to the organized life of the American Church.

The Russian Church in America should retain full autonomy with the possible exception of the right of appeal of bishops, the bestowal of the Holy Myrrh, the awarding of

higher titles to the clergy, communications with the other Orthodox Patriarchates and the right to veto the election of the Metropolitan or bishops (but only on strictly canonical or moral grounds and after full and impartial hearing).

In particular it should be provided that there be no interference from Moscow in the titles to American Church properties or American Church finances; the rules for administration of the American Church adopted at the New York Sobor of 1937 should remain in force except as expressly amended by future American Sobors; and the American Church of its own initiative should be privileged to take such steps as it may see fit looking toward the eventual formation of an autocephalous Orthodox Church in America subject to recognition by all of the Orthodox Patriarchs.

Conclusion

The American Church has sympathized with its mother church in all of her trials and tribulations. It has rejoiced in the privileges which have been recently accorded to her. But there must be further discussion and clarifi- [fol. 359] cation of the relationship between the two churches. Why was the American Church invited to send representatives to the Sobor of January, 1945? Was it so that they might attend the Sobor? Then why was the visa of the lay representative cancelled and why were the two clerical representatives who made the trip not permitted to arrive in time for the Sobor? Why were those representatives not given an opportunity to discuss the conditions of the Ukase but merely handed the completed document for delivery to Metropolitan Theophilus? It was an arduous journey for them to make if their function was only that of couriers. The Ukase might more economically have been brought here by Exarch Benjamin, who went to Moscow and was present at the Sobor.

The substance of the Ukase, as well as its tone and all of the circumstances leading up to and surrounding the issuance of the Ukase, suggest the high-handed methods of an autocratic bureaucracy. The American Church is flourishing in the atmosphere of democratic freedom. It was no fault of the American branch of the Russian Orthodox Church that by force of circumstances it was compelled to

establish its own church administration. It was no fault of the American Church that the Patriarchate laid a suspension on it because its clergy declined to give a pledge of loyalty to the Soviet power.

[fol. 360] It is an American Church and an American Church it must continue to be.

New York, July 10, 1945.

Faithfully yours, Most Rev. Theophilus, Archbishop of San Francisco and Metropolitan of Russian Orthodox Greek Catholic Church of North America, President, Rt. Rev. Makary, Bishop of Brooklyn, Very Rev. Theofan Buffetoff, Very Rev. John Kozitzky, Very Rev. Vasily Lisenkovsky, Very Rev. Joseph Dzvonchik, Secretary, Very Rev. Joseph Pishtey, Treasurer, Very Rev. John Telep, Joseph Lipko, Andrew Blaniar, Financial Secretary, Ivan Michaelson Czap, Michael Perhach, Rt. Rev. Alexy, Bishop of Aleutian Islands and Alaska, Comptroller, Very Rev. Alexander Kukulevsky, Comptroller, Rev. Dmitry Ressetar, Comptroller, Metropolitan Council of the Russian Orthodox Greek Catholic Church of North America.

[fol. 361] PLAINTIFF'S EXHIBIT 17

[Telegram]

The Most Holy Alexy
Patriarch of Moscow and All the Russias
Moscow USSR

Your Holiness at All American Sobor of Russian Orthodox Greek Catholic Church of North America held at Cleveland Ohio on November 26-29 1946 it was decided to request your Holiness to continue American Church in your fold and be our spiritual head under conditions preserving complete autonomy of American Church now existing with highest law making body remaining periodic All American Sobors at which Metropolitans are elected statutes of Church are adopted and life of Church is in all respects guided stop At same time it was decided to termi-

nate any administrative recognition of Synod of Russian Church abroad but to remain in brotherly and spiritual unity with all parts of Russian Church throughout world stop It is our pleasant duty to communicate these facts to your Holiness Official Minutes of Sobor have just been approved and are being forwarded to your Holiness for your information stop Your brother in Christ

Theophilus, Archbishop of San Francisco, Metropolitan of Russian Orthodox Greek Catholic Church of North America.

[fol. 362] PLAINTIFF'S EXHIBIT 17-A

Received Saturday, January 25, 1947, 3:45 P. M.

Metropolitan Theophilus, 59 East 2nd St., NYC

I have received your Eminence's telegram today stop I welcome decisions of Cleveland Sobor stop On Principle I have no objections against autonomy for our Orthodox Church in America Stop In peaceloving spirit I commission Metropolitan of Leningrad Gregory leaving for America in near future discuss all questions together with your Eminence stop God's blessing clergy and all flock stop From now on I consider your Eminence and all your clergy in unity of prayer with us celebrate service together with Metropolitan Benjamin in token of this communion stop Christ is with us and always will be stop

Patriarch Alexy.

[fol. 363] PLAINTIFF'S EXHIBIT 17-B

Text of cable sent January 31, 1947 to the Patriarch at Moscow:

This message of your Holiness has brought us great joy. We await from your Holiness an official Ukaz recognizing autonomy for our Church in North America as referred to in your Holiness' telegram to me. This may preclude necessity of sending Metropolitan Greogory to America as details can be completed by letters. However if your Holiness deems necessary to send Metropolitan Gregory to America I have no objections and hope everything will be decided peacefully for the good of the unity of the Church

Metropolitan Theophilus.

PLAINTIFF'S EXHIBIT 18

(Pursuant to stipulation this exhibit, which is an extract from the meeting of the Moscow Synod held on August 24, 1923, and appears in the printed Case on Appeal in *Kedrovsky* v. *Rojdesvensky* at pp. 556-558, fols. 1668-1672, is not printed.)

[fol. 364] PLAINTIFF'S EXHIBIT 18-A

(Pursuant to stipulation this exhibit, which is the certificate of appointment and consecration of John S. Kedrovsky as Archbishop of North America and the Aleutian Islands and appears in the printed Case on Appeal in *Kedrovsky* v. *Rojdesvensky* at p. 558, fols. 1673-1674, is not printed.)

PLAINTIFF'S EXHIBIT 19

(Pursuant to stipulation this exhibit, which consists of the Temporary Statutes of the Russian Orthodox Church Abroad, is not printed.)

DEFENDANTS' EXHIBIT A

Whereas, the 7th All American Sobor of the Russian Orthodox Church of North America having assembled in Cleveland, Ohio, on November 26-28, 1946, and having thoroughly considered the relations of our Church in America with the Patriarchal Church of Moscow and all Russia, and affirming our complete faith and loyalty to His Eminence, our elected, Metropolitan Theophilus;

Now therefore be it resolved, that His Beatitude Alexy, Patriarch of Moscow and All Russia be requested to continue us in his fold and be our Spiritual Head, conditioned upon the Church in America retaining its present autonomous status and the right of self government. That the periodic All American Sobors of the Russian Orthodox Church of North America shall remain the Supreme Leg- [fol. 365] islative and Administrative body of our Church; at these Sobors the Church shall continue to elect its own Metropolitan, and make and adopt its own laws by which the Church in North America is, in all respects, governed;

And whereas the Patriarchal authority is not consistent with the authority of the Synod of the Russian Orthodox Church Abroad, this Sobor does hereby

Resolve: That any administrative recognition of the Synod of the Russian Orthodox Church Abroad is hereby terminated, retaining, however, our spiritual and brotherly relations with all parts of the Russian Orthodox Church abroad;

And be it further resolved that in the event that the aforesaid conditions are found not to be acceptable to His Beatitude, the Patriarch of Moscow and all Russia, the Russian Orthodox Church of North America shall continue, and does remain, self-governing until such time as the Patriarch of Moscow and all Russia finds it possible to accept the conditions herein stated.

I, John Kozitzky, Secretary of the Metropolitan Council of the Russian Orthodox Greek Catholic Church of North America, do hereby certify that the foregoing is a true copy of the English text of a resolution which was duly adopted, in both English and Russian texts, by the All American Sobor of said Church, duly convened and held at Cleveland, Ohio, on November 26-28, 1946.

Witness, my hand and the seal of said Council, this day of April, 1947.

(Seal) John Kozitzky.

[fol. 366] DEFENDANTS' EXHIBIT B

(Pursuant to stipulation this exhibit, which is the Russion text of the ukase (no. 1005) of June 29, 1934 (see Defendants' Exhibit C), is not printed.)

DEFENDANTS' EXHIBIT C

Translation of Ukase of the Moscow Patriarchate

To His Eminence, Most Reverend Benjamin Fedchenkov, Archbishop of the Aleutian Islands and North America, Exarch of the Moscow Patriarchate in North America.

The Acting Patriarchal Locum Tenens and his Patriarchal Holy Synod, heard:

The facts concerning the refusal of Metropolitan Platon Rojdestvensky, governing our North American Diocese, to render canonical submission to the Patriarchate of Moscow in the person of the Acting Patriarchal Locum Tenens and the Holy Synod; also the declaration of the same Metropolitan Platon proclaiming the said Diocese Autocephalous;

And they referred to:

(I) The Decision of His Holiness the Patriarch and His Holy Synod, dated January 16, 1924, No. 28, as follows: "As we have data proving that the Metropolitan of North America has engaged in public acts of Counter-Revolution [fol. 367] directed against the Soviet power and of disastrous consequences to the Orthodox Church,—Metropolitan Platon will be dismissed from the government of the North American Diocese from the day on which this Present Decision is announced to him. (2) The choice of a candidate for the North American Episcopal See will be the object of a special discussion. It will be his duty personally to announce this Decision to Metropolitan Platon and

to take over from him all the Church property, governing the North American Diocese according to the special instruction which will be given him. (3) Metropolitan Platon will be invited to come to Moscow to put himself at the disposal of the Patriarch. (Signed) Patriarch Tikhon, Archbishop Tikhon (formerly of Ural), Archbishop Seraphim (now the Metropolitan of Kazan), and Archbishop Peter (now Metropolitan of Krutitsy and the Patriarchal Locum Tenens)."

(II) The Decision of the Acting Locum Tenens and the Patriarchal Holy Synod dated March 22, 1933, numbered 29, by which they (1) appointed His Eminence Archbishop Benjamin Fedchenkov to the position of Patriarchal Exarch in America to investigate the affairs of the Russian North American Diocese and (2) commissioned him to take over the government of the said Diocese upon the dismissal of Metropolitan Platon therefrom.

Thereupon, By their Decision of August 16th, 1933, Numbered 61, they decreed:

I. Consequent upon the already effected Decisions concerning the dismissal of Metropolitan Platon from the administration of the North American Diocese, and in [fol. 368] view of the Archbishop Benjamin's having entered upon the temporary administration of the said Diocese with his commission to organize the Diocesan administration according to the possibilities of local conditions—there should be final consideration by us concerning definitive arrangement of the administration of the North American Diocese after the receipt from His Eminence the Exarch of subsequent reports.

II. That we declare the proclamation of the North American Diocese as Autonomous by Metropolitan Platon in opposition to the will and without the consent of the Moscow Patriarchate (which is evidently, even by the acknowledgments of Metropolitan Platon himself, "the lawful Church Authority" for this same Diocese) to be an act rudely violating Church Discipline; and as such to count it null and void and to revoke it.

III. That we declare Schismatic (Raskolnicki) the religious group organized around Metropolitan Platon; that we declare the Diocesan administration and other organiza-

tions either existing now or which may be formed in the future in this group canonically illegal; and that we declare all their decisions concerning the Orthodox churches and concerning parishes in the Diocese, and in particular their ordaining and appointing Bishops and other Clergy and church officials, illegal and invalid.

IV. That Metropolitan Platon (Rojdestvensky), as the initiator and chief author of the schism created, be sum- [fol. 369] moned before the Court of Bishops and charged with violations of the 34th and 31st Canons of the Holy Apostles; the 14th and 15th of the Double Council; the first Canon of Basil the Great, and other similar Canons; and that meantime we place Metropolitan Platon under Prohibition from performing Divine Services until either he repents or the ecclesiastical Court shall have rendered a decision.

V. To propose to their Graces the Bishops and to the Priests and Church officials and to the Laymen who are in the North American Diocese that they, breaking off from communion with those who entered into schism, should express to the Patriarchal Exarch (in America)—or directly to the Acting Locum Tenens—(in Moscow) their submission to this present decision and their determination and promise in future to remain in the canonical jurisdition of the Moscow Patriarchate. The Acting Patriarchal Locum Tenens and His Patriarchal Holy Synod also heard:

The verbal proposal of the Acting Locum Tenens;—"His Eminence, the Exarch in America reports that he has organized in New York a Diocesan Council and that our North American Diocese has begun official existence. Therefore and in order to definitely settle the status of His Eminence, Archbishop Benjamin and his position in America, I consider it an opportune time to appoint him permanent Ruling Bishop of our North American Diocese, with all the rights and plenipotentiary powers which appertained to his predecessors in that see, assigning to him the title of Archbishop of the Aleutian Islands and North [fol. 370] America, reserving to him also the status of Exarch of the Moscow Patriarchate in America (in order that he may extend his jurisdiction over the Russo-Ameri-

can Dioceses and Parishes which lie beyond the boundaries of the United States), also to grant to him the right to wear the cross on the "Klobuk"; and by their resolution of November 22, 1933, Numbered 92, they

Decreed:

I. Concerning the appointment of Archbishop Benjamin Fedchenkev as permanent Ruling Bishop of the Russian North American Diocese with the title of Archbishop of the Aleutian Islands and North America, also reserving to him the status of Exarch of the Moscow Patriarchate in America, and also granting to him the right to wear the cross on his Klobuk; to accept with recognition as such.

II. The establishing, by His Eminence the Archbishop Exarch of a Diocesan Council of the structure indicated by him is confirmed, and about this it is resolved to send to His Eminence the Archbishop-Exarch a Decree for execution.

The present copy of this decree is sent to the Archbishop of the Aleutian Islands and North America, Exarch of the Moscow Patriarchate in America, Benjamin Fedchenkov, in order to register his relevant governmental institu-[fol. 371] tion in the United States, Canada and other countries of America.

No. 1005, June 29, 1934, (Zamestetl) Substitute or Representative, Keeper of the Records of Patriarchal Holy Synod Archpriest Alexander Lebedeff, Patriarchal Locum Tenens, Sergius M. of Moscow. (Seal).

January 27, 1936.

The Consulate General of the U.S.S.R. at New York hereby certifies the signature and seal on the above document and that this document is issued in accordance with the laws of the U.S.S.R.

Consul (Signature illegible), No. 380, (Seal).

(Stamps affixed)

The foregoing translation has been examined and compared with the Russian original and is hereby certified to be complete and accurate in all respects.

Alexander H. Carassó, Official Court Interpreter,
City Magistrates Courts, New York City (Seal).

[fol. 372] DEFENDANTS' EXHIBIT D

Decree of the Moscow Patriarchy, the Patriarch of Moscow and All Russia

Decision of the Most Holy Patriarch of Moscow and all Russia and the Holy Synod, of February 14, 1945.

The Most Holy Patriarch of Moscow and all Russia and the Holy Synod having examined the report brought to them by Bishop Alexy concerning the desire of the American Diocese to be reunited with the Russian Mother Church and concerning the project for the establishment of an American Church after this reunion—consider the following conditions of benefit to the church and canonically possible:

I. All the dioceses of North and South America, and also of Canada, make-up the Metropolitan District—an exarchate of the Moscow Patriarchy. The Metropolitan of this district, besides the title of his diocesan city, also bears the title of Patriarchal Exarch of all America and Canada.

II. No later than the middle of the period between Easter and Pentecost in 1945 an all American Orthodox Church Sobor is to be convoked, consisting of all the bishops, representatives of the clergy and laymen—of the present exarchate headed by Metropolitan Benjamin; as well as of the Metropolitan District, headed by Metropolitan Theophilus. The Archbishop of Yaroslavl and Rostov, Alexy, purposely sent to America by the Holy Patriarch of Moscow and all Russia, is to preside at the Sobor.

[fol. 373] III. The Sobor:

a) expresses the decision of the American orthodox dioceses to be reunited with the Russian Mother Church;

b) in the name of the American Orthodox Church declares its abstention from political activities against the U.S.S.R. and gives corresponding orders to all parishes;

c) in accordance with American laws (not less than a two thirds vote) elects a Metropolitan—head of the Metropolitan District and presents the one chosen for confirmation by the Moscow Patriarchy.

Note 1—On its part, the Moscow Patriarchy recommends to the Sobor as candidates the Metropolitan Exarch of all America and Canada—Metropolitan Benjamin, and Archbishop Alexy, without limiting the Sobor in its right to nominate and elect its own candidate to this post.

Note 2—To the Moscow Patriarchy belongs the canonical right to refuse confirmation of the chosen candidate if he be considered unsuitable by the Patriarchy, for any motivated reason whatsoever, to bear the title of Metropolitan and Exarch.

IV. In view of the distance of the American Metropolitan District from the Russian Mother Church and certain difficulties in contract, in comparison with other exarchates of the Moscow Patriarchy, the Metropolitan-Exarch, together with the Sobor of local bishops, may be given some extended powers by the Moscow Patriarchy, [fol. 374] but the right to confirm candidates for bishop, the right to reward the clergy with higher titles, and the right of appeal as regards bishops, clergy and others, remain with the Moscow Patriarchy.

V. In case of the acceptance of the above conditions by the Sobor of Bishops, headed by Metropolitan Theophilus, the suspension laid upon the American Church by the Moscow Patriarchy on January 4, 1935, is removed for the period (prior to the all American Church Sobor).

(signed) Patriarch of Moscow and all Russia Alexy,
The Administrator of the Affairs of the Moscow Patriarch, Archpriest Nicholas Kolchitsky.

Moscow, February 16, 1945, #94.

[fols. 375-377] DEFENDANTS' EXHIBIT F

(Order of the Supreme Court of the State of New York authorizing the transfer of St. Nicholas Cathedral and another property to Most Reverend Evdokim Meschobsky, Archbishop of Aleutia and North America of the Christian Orthodox Catholic Church of the Eastern Confession in North America—omitted in printing.)

[fol. 378] Enter, E. J. G., Justice of Supreme Court.

NEW YORK SUPREME COURT, NEW YORK COUNTY

IN THE MATTER

of

The Application of the RUSSIAN ORTHODOX ST. NICHOLAS CHURCH IN NEW YORK, to sell and transfer a portion of its real property.

To the Supreme Court of the State of New York:

The petition of the Russian Orthodox St. Nicholas' Church in New York respectfully showeth:

1. That the name of said corporation is "The Russian Orthodox St. Nicholas' Church in New York" and the names of the trustees and principal officers and their places of residence are as follows:

[fol. 379] (1) His Excellency, George Bakhmeteff, Ambassador Extraordinary and Plenipotentiary of Russia to the United States—Trustee and residing at Washington, District of Columbia.

(2) His Excellency, Michael Oustinoff, Consul General of Russia to the United States—Trustee, residing at No. 22 Washington Square North, New York City, New York.

That Section 50 of Article 3 now constituting Section 90, Article 5 of the Religious Corporations Law of the State of New York, provides:

"That a certificate of incorporation of an unincorporated Christian Orthodox Catholic Church of the Eastern Confes-ion shall be executed and acknowledged by the envoy extraordinary and minister plenipo-

tentiary, and the consul general of Russia to the United States, then acknowledged and received as such by the United States."

Section 51, Article 3 now constituting Section 91 of Article 5 of said law provides:

"The envoy extraordinary and minister plenipotentiary, and the consul general of Russia to the United States, acknowledged and received and such, and their successors in office shall, by virtue of office be the trustees of every incorporated Christian Orthodox Catholic Church of the Eastern Confession in this state."

II. That such corporation was formed under Section 50, Article 3 now constituting Section 90, Article 5 of the Religious Corporations Law of the State of New York, [fol. 380] and a certificate of incorporation was filed in the office of the Clerk of the County of New York, State of New York, on November 21, 1899, and that a copy of said certificate of incorporation is hereto annexed, marked "Petitioner's Exhibit A," and is made a part of this petition.

III. That the purposes of the said corporation and the scope of its activity, are set forth in full in the said certificate of incorporation (Petitioner's Exhibit A).

IV. That as such corporation it is the owner of the following described real property:

(Description of properties omitted in printing.)

[fol. 381] V. That the title to the properties of the Christian Orthodox Catholic Church of the Eastern Confession in North America, always was and now is by custom and practice, vested in the Archbishop of said Church, as trus-[fol. 382] tee for the said Church and its parishioners; that the present Archbishop of the said Christian Orthodox Catholic Church of the Eastern Confession in North America, is the Most Reverend Evdokim Meschersky, the properties and finances of the said Christian Orthodox Catholic Church of the Eastern Confession in North America are regulated and controlled by an unincorporated board, known as the North American Ecclesiastical Con-

sistory, consisting of five duly ordained clergymen of the said church over which the said Archbishop presides; that the said Archbishop holds the said properties in trust only for the uses and benefits of the church and its parishioners, subject to the authority and control of the said North American Ecclesiastical Consistory, that the said Christian Orthodox Catholic Church of the Eastern Confession in North America owns and controls numerous pieces of real estate throughout the United States, Canada, Alaska and the Aleutian Islands, and that in the great majority of instances the title to the said properties vests in the Archbishop in the manner hereinbefore set forth while the power regulating and controlling the said properties vests in said North American Ecclesiastical Consistory; that in the administration of the church affairs it becomes frequently necessary to sell, transfer or mortgage the said properties, that it is the usual procedure to have the Archbishop act upon the recommendation of the North American Ecclesiastical Consistory; that upon such recommendation the interest of the corporation will be promoted by the sale or transfer of the said real property as specified above, from said corporation to the Most Reverend Evdo-[fol. 383] kim Meschersky, in his capacity as trustee for said church and its parishioners, by such sale or transfer; that the North American Ecclesiastical Consistory will not be embarrassed in its action by delays or otherwise, in the event that it should become necessary to mortgage, transfer or exchange the said properties.

VI. That the two parcels hereinabove described are free and clear from any debts and incumbrances, except that Parcel No. 2 is uncumbered by mortgages amounting to $25,000, that the market value of the said parcels of real property of the within corporation is almost $185,000—and that the cash value of its personal assets is about $20,000.

VII. That no previous application has been made for the within order.

Wherefore your petitioner prays that an order of this court be entered giving it leave to sell or transfer the real property above described to the Most Reverend Evdokim Meschersky, in his capacity as trustee for the Christian

Orthodox Catholic Church of the Eastern Confession in North America.

Dated, March 27th, 1916.

G. Bakhmeteff, Ambassador Extraordinary and Plenipotentiary of Russia to the United States.
M. Oustinoff, Consul General of Russia to the United States.

[fol. 384] *Duly sworn to —. Jurat omitted in printing.*

[fols. 385-386] PETITIONERS' EXHIBIT A TO DEFENDANTS' EXHIBIT F

Certificate of Incorporation of the Russian Orthodox St. Nicholas' Church in New York. Filed and recorded in the office of the Clerk of the County of New York, November 21, 1899.

"We, the undersigned, Count Cassini, Ambassador of Russia, Waldemar Teplow, the Consul General of Russia to the United States, desiring to incorporate Russian Orthodox St. Nicholas' Church in New York as a Christian Orthodox Catholic Church of the Eastern Confession, in pursuance of Section 50 of the Religious Corporations Law, do hereby make, sign and acknowledge and file this certificate for such purpose as follows:

First: the name by which such church shall be known is Russian Orthodox St. Nicholas' Church in New York.

Second: The principal place of worship of the church corporation is to be located in the Borough of Manhattan, in the City of New York, State of New York.

In Witness Whereof, we have made, signed and acknowledged this certificate this 18th day of November, one thousand eight hundred and ninety-nine.

Count Cassini, Ambassador of Russia, Waldemar Teplow, Consul General of Russia."

(Acknowledgments omitted in printing.)

[fol. 387] NEW YORK SUPREME COURT, NEW YORK COUNTY

IN THE MATTER

of

The Application of the RUSSIAN ORTHODOX ST. NICHOLAS' CHURCH IN NEW YORK, to sell and transfer a portion of its real property.

CITY AND COUNTY OF NEW YORK, ss.:

Rev. Peter Kohanik, being duly sworn, deposes and says:

That he is 36 years of age and resides at 1425 Madison Avenue, in the Borough of Manhattan, City and State of New York, that he is the Secretary of the North American Ecclesiastical Consistory, a committee consisting of 5 duly ordained clergymen of the Christian Orthodox Catholic Church of the Eastern Confession in North America over which Committee the Archbishop of said church presides; that said Consistory exercises supreme authority over the conduct, property and finances of the said church in North America, subject only to the superior control of the Most Holy Synod at Petrograd, Russia; that uniformly the legal title to the properties of the said church in North America is vested in its Archbishop and held by him in trust for the use and purposes of the Christian Orthodox Catholic Church of the Eastern Confession and its parishioners, in [fol. 388] the manner outlined and recommended by the consistory.

That in the administration of affairs of said church, it becomes frequently necessary to transfer, sell, exchange, mortgage or otherwise dispose of the church properties, and very often on short notice; that the pieces of property mentioned in the Petition herein are actually owned and controlled by the Russian Orthodox Catholic Church of the Eastern Confession of North America, although the legal title thereto is vested in the petitioning corporation; that said pieces of property are located as follows: 13-15-17 East 97th Street and 1121 East 7th Street, in the Borough of Manhattan, County, City and State of New York; that the title to these pieces of property vests in the Russian Orthodox St. Nicholas' Church in New York, a religious

corporation duly organized on November 21, 1899, as your deponent is informed and believes; that said corporation is inactive, and so far, as your deponent knows, has never held a meeting or elected officers nor has it ever attempted to exercise any control or authority over said properties. Nor has it performed, so far as your deponent knows, any of the functions of a religious corporation; nor has it ever attempted to interfere in any way with the engaging or dismissal of the rector and his assistants, the choir singers or other administrative aids of said church, nor has it ever sought to exercise any control or authority over the management of the said properties.

That the North American Ecclesiastical Consistory has had actual control of the said properties since they were purchased by the said corporation; that it becomes frequently necessary to file Petitions with the Municipal au- [fol. 389] thorities of the City of New York, for the exemption of taxes, assessments, water rents and other penalties, and that at times the Consistory has been embarrassed and annoyed in its said applications because the title to said property is vested in the petitioning corporation; that it will promote the efficiency of the said Consistory in administering the said properties and it will avoid serious delays and embarrassments if the title to the said property were vested in the Archbishop, so that title to all the properties of the Russian Orthodox Greek Catholic Church would be vested in a single person.

That said corporation has no outstanding debts or obligations except that parcel No. 2 is encumbered by mortgages amounting to $25,000—leaving on both parcels an equity of about $160,000; that the rights and remedies of creditors will not be impaired by the transfer of said properties and that said conveyance will promote and conserve the objects of said church.

Rev. Peter Kohanik.

Sworn to before me this 27th day of March, 1916, Hugh G. Courtney, Commissioner of Deeds of the City of New York, County Clerk's No. 1179, Reg. No. 17085, Term expires October 26, 1917.

[fol. 390] NEW YORK SUPREME COURT, NEW YORK COUNTY

IN THE MATTER

of

The Application of the RUSSIAN ORTHODOX ST. NICHOLAS CHURCH IN NEW YORK, to sell or transfer a portion of its real property.

CITY, COUNTY AND STATE OF NEW YORK, ss.:

The Most Rev. Evdokim Meschersky, being duly sworn, deposes and says:

That he is 44 years of age and resides at No. 15 East 97th Street, in the Borough of Manhattan, City, County and State of New York; that he is Archbishop of the Russian Orthodox Greek Catholic Church in North America; that he has read the foregoing petition of the Russian Orthodox St. Nicholas' Church in New York and the affidavit of Rev. Peter Kohanik and that he verily believes that the statements therein contained are true; that by custom and precedent the title to the properties of the Russian Orthodox Greek Catholic Church in North America is vested in the Archbishop who holds the same in trust for said church and its parishioners; that the properties and finances of the said church are under the supervision and control of an unincorporated committee of 5 duly ordained clergymen of said church, known as the North American Ecclesiastical Consistory; over which committee the Archbishop presides; that the action of the Consistory in matters relat-[fol. 391] ing to the administration of the church and its properties is final and subject only to the superior control of the Most Holy Synod at Petrograd, Russia.

That in the administration of the affairs of the Russian Orthodox Greek Catholic Church in North America it frequently becomes necessary to transfer, exchange, sell or mortgage church properties sometimes on very short notice; when delays might prove both embarrassing and expensive; that while the title to the properties mentioned in the said petition has been and now is vested in the Russian Orthodox St. Nicholas' Church in New York the actual administration and control of said property has at all times been exercised by the said North American Ecclesias-

tical Consistory; that it will greatly add to the efficiency and expediency of the administration of said church properties to have the title to all the properties vested in the same person; that your deponent therefor respectfully submits that it will be to the best advantage of the Russian Orthodox Greek Catholic Church in North America to have the title to the properties in the petition herein mentioned, transferred from the said Russian Orthodox St. Nicholas' Church to your deponent, the Most Rev. Evdokim Meschersky, Archbishop of the Russian Orthodox Greek Catholic Church of North America.

Archbishop Evdokim Meschersky.

Sworn to before me this 27th day of March, 1916, Hugh G. Courtney, Commissioner of Deeds of the City of New York, County Clerk's No. 1179, Reg. No. 17085, Term expires October 26, 1917.

[fol. 392] Clerk's Certificate to foregoing paper omitted in printing.

[fols. 393-399] (Deed made April 12, 1926, to St. Nicholas Cathedral and another property by Russian Orthodox St. Nicholas Church to the Most Reverend Evdokim Meschobsky, Archbishop of Aleutia and North America of the Christian Orthodox Catholic Church of the Eastern Confession in North America—omitted in printing.)

[fol. 400] DEFENDANTS' EXHIBIT G

Russian Orthodox Church, Most Rev. Benjamin, Metropolitan of the Aleutian Islands and North America, Patriarchal Exarch in America, Diocesan Consistory, St. Nicholas Cathedral, 15 East 97th Street, New York, N. Y.

America, Karlovci, and Moscow; By Ralph Montgomery Arkush, Legal Advisor to the Metropolitan Council of the Russian Orthodox Greek Catholic Church of North America.

A break in the administrative relations between the Russian Orthodox Greek Catholic Church of North America, headed by Metropolitan Theophilus, and four of his bishops has been officially announced by the Bishops' Council and the Metropolitan Council of the Church. The hierarchs named are Archbishop Tikhon of Seattle and Western America, Archbishop Vitaly of Jersey City and Eastern America, Archbishop Ioasaf of Canada, and Bishop Ieronium of Detroit and Cleveland. (It is reported that recently Bishop Ieronim was promoted to the rank of Archbishop by action of the Munich Synod, taken without the approval of Metropolitan Theophilus.) For the time being the Metropolitan is taking on himself the duties of the four former diocesans. Plans for filling the vacancies permanently [fol. 401] are under way, an additional bishop having been recently consecrated [L. C., April 20th], and the consecration of a second bishop having been announced for May 11th.

The immediate cause of the rupture was the refusal of the four bishops to accept the decision of the All-American *Sobor* held at Cleveland on November 26-29, 1946. That body was convened for the express purpose of giving all of the 300 or more parishes in the Church, through their clerical and lay delegates, the opportunity of expressing their views on the relationship between the North American Church and the Moscow Patriarchate. It was the first All-American *Sobor* that had been held since 1937. Every parish delegation was given time to present its views to the assembly. The Metropolitan presided. All of the bishops, including the four above named, were present and most of the bishops participated in the discussion. The pre-*Sobor* Committee, which was in an advantageous position to control the proceedings to some extent, was headed by Archbishop Vitaly. Considerable criticism was heard among the delegates of the tactical advantages of the position: for example, the leading exponents of the view that

no connection should be had with the Patriarchate because of political conditions in Russia were given a preferred position on the agenda. The speeches made at the *Sobor* and the written declarations which had been adopted at parish meetings and were read to the *Sobor* reflected a wide divergence of views, from the bitter anti-Patriarchites to those who were for reunion with the Patriarch on any terms.

A separate but related question, which was of primary interest to the delegates, was that of the relationship be- [fol. 402] tween the American Church and the Russian Church abroad. On paper the American Church was a constituent part of the Russian Church abroad, the temporary statutes for the government of that body having been approved at the All-American *Sobor* held in New York in 1937. The connection, however, aroused little enthusiasm among the rank and file of the American clergy and laity.

The Diaspora

The organization of the Russian Church abroad was an attempt to unite in one body all parts of the Russian Orthodox Church outside of the Soviet Union. When civil war separated the dioceses in the southern part of Russia from the central Church administration, headed by Patriarch Tikhon, a temporary administration was organized in Stavropol. After the defeat of the White armies, four bishops who had been members of the Stavropol and of the Crimean Church administrations fled to Constantinople where they created a Bishops' Synod. Later they moved to Sremski Karlovci in Yugoslavia where they were taken under the protection of the Serbian Patriarch. At this time Europe was filled with Russian refugees and the effort of the Karlovci group to bring order into the ecclesiastical situation was justified. However, when the Karlovci Synod began sending bishops who attempted to set up a jurisdiction parallel to that of the Russian Orthodox Church then existing in America, the position of the Synod was indefensible. The Russian Orthodox Church of North America has had a continuous existence on this continent for over 150 years, first as a mission, then as a missionary diocese, then as a regular diocese, of the Russian Orthodox [fol. 403] Church, and finally as an autonomous body.

The administrative autonomy of the American Church was declared at an All-American *Sobor* held at Detroit in 1924, and was expressly based on the political conditions then existing in Russia. The language of the resolutions expressly preserved spiritual communion with the Patriarchate. This condition of autonomy was affirmed at the All-American *Sobor* held at Cleveland in 1934 when Metropolitan Theophilus was elected. The autonomous character of the American Church has been upheld by the civil courts and declared by statutes enacted by or now pending in the legislatures of a number of states.

The peace and unity of this self-governing body was broken by the arrival of four bishops sent by the Karlovci Synod, precisely the same four mentioned in the recent announcement. They succeeded in attracting to themselves or founding a very few parishes consisting mostly of the so-called "White" refugees. But, although attracting few followers, they constituted a source of confusion and unrest in the American jurisdiction. Accordingly Metropolitan Theophilus went to Karlovci in 1935 and agreed to the scheme of organization of the Russian Church abroad. This contemplated four metropolitan districts: North America, Western Europe, the Near East, and the Far East. The late Metropolitan Eulogius, who was to head the Western European district, also assented. His flock, however, refused to ratify, so that the district of Western Europe was placed under the jurisdiction of the Ecumenical Patriarch. This defection and the comparative paucity of Russian Orthodox parishes in other parts [fol. 404] of the world resulted in the North American district's being by far the largest component of the Russian Church abroad. The temporary statutes provided for an annual council of all the bishops of the constituent districts and for a permanently sitting bishops' synod consisting of one delegate from each district; the distant districts such as the North American and the Far Eastern might appoint as their delegates bishops residing in Europe. It was stipulated that the first president of the council and synod should be Metropolitan Anthony, formerly of Kiev and Galicia. At his death Metropolitan Anastasius became president.

Upon the signing of these temporary statutes the four

Karlovcian bishops in North America submitted to the jurisdiction of Metropolitan Theophilus, so that he, at least apparently, reaped the reward of his trip to Karlovci. The connection with the Karlovci Synod, however, was irksome and eventually, during World War II, became absurd. By reason of military or political conditions the existence of the Near Eastern and Far Eastern districts, or at any rate the connection of the Synod with those districts, was practically eliminated. A very few parishes in Western Europe, South America, and other parts of the world recognized the Karlovci Synod. Consequently, in practical effect, this Synod had become a mere paper superstructure on top of the North American Church. All sensible reasons for the continuance of this administrative connection had terminated. Nevertheless Metropolitan Theophilus loyally went through the form of submitting to Metropolitan Anastasius and his Synod, which eventually moved to Munich, the minutes of meetings of the Council of Bishops, the promotion of bishops to the rank of archbishop, etc. [fol. 405] One phase of the connection with the Karlovci-Munich Synod and the North American Church which caused almost universal resentment among the Church membership was the alleged political activity of members of the Synod or its staff. In the early days of the Synod prior to the organization of the Russian Church abroad various manifestoes issued from Karlovci indicating the hope for the restoration of the czarist regime. At a later stage it is alleged that persons connected with the Synod uttered expressions of a pro-Hitler character, although this charge has been denied. (At least it is certain that Archbishop Vitaly on his own responsibility joined in a telegram to President Roosevelt urging that the United States refrain from giving military assistance to the Soviet Union after the attack by Hitler.) The charges that the Karlovci-Munich Synod and its adherents have unjustifiably embroiled themselves in political activity have not endeared them more to the American Church membership.

Archbishop Alexy

Finally, when Archbishop Alexy of Yaroslav and Rostov came to this country in 1945-1946 he made it clear that a *sine qua non* of restoration of spiritual communion between

the American Church and the Moscow Patriarchate was the termination of the relationship with Metropolitan Anastasius. Whatever differences of opinion there were at the Cleveland *Sobor* last November on the exact nature of the relationship to the Patriarchate, there was only a minute fraction of the delegates who insisted on the continuance of a connection with Metropolitan Anastasius. [fol. 406] The vote of 187 to 61 which finally recorded the action of the *Sobor* is not a mathematical indication of the division of views on the question, since the resolution on which the vote was taken combined the questions of both the Patriarchate and the Russian Church abroad. Several resolutions in different form had been submitted to the assembly and many of those who voted against the resolution actually adopted did so in the expectation that if the resolution was defeated the prevailing sentiment of the meeting could be expressed in a different manner. For several days prior to the taking of the vote an attempt was made by the committee on resolutions and many of the leading delegates to prepare a resolution which would bring to an end the absurd situation in which the Munich tail was wagging the North American dog, but at the same time would provide a framework of Church government in which all of the Russian Church bodies outside of the Soviet Union and its sphere of influence would normally fit. Such a scheme was particularly suitable at the moment when many of the DP's and other Russian Orthodox people in Germany and Austria were being ministered to by bishops and priests of the Munich jurisdiction. A form of resolution to this end was reported by the committee on resolutions but never came to a vote.

The resolution adopted requested the Patriarch to continue as spiritual head of the American Church conditioned on the continuance of its administrative autonomy and terminated the administrative connection between the American Church and the Synod of the Russian Church abroad [L. C., December 8th]. Archbishop Vitaly and the three other Karlovcian bishops had and took the opportunity [fol. 407] of influencing the delegates to vote against this resolution. They raised no question as to the legal or canonical power of the *Sobor* to pass on the two questions

covered by the resolution until the results of the secret ballot had been announced. Only then did Archbishop Vitaly make a spirited protest.

The main body of Church membership, particularly the younger people whose influence is being more and more felt, and whose interest is indispensable to the life of the Church, are insistent that matters of vital Church policy are to be passed on in a constitutional and democratic fashion. The four bishops who have refused to concur in the decision of an assembly in the preparation for which and in the deliberations of which they actively participated have thereby repudiated the principle of constitutional and democratic church government. Their withdrawal from the Church will doubtless result in greater harmony in Church councils. It is believed that not more than 5 or 6 parishes at the most will follow them.

DEFENDANTS' EXHIBIT I

Memorandum on the Status of the Russian Orthodox Church in America

At the coming all-American Church Sobor in Cleveland, November 26 to 29, such decisions should be made, which, for a long time, will determine the destiny of the Russian Orthodox Church in America.

Fully conscious of the responsibility, placed on each member of the Church, for the universality of the church structure, the undersigned have placed herewith, in printed [fol. 408] form, our basic thoughts on the main question which today stands before our Church. They bring this memorandum at the present time, to the attention of the members of the coming Sobor, and to all Russian Orthodox people in America, in the hope that, by acquainting themselves with this memorandum, they will be aided in understanding the canonical status of our Church and thereby find ways for its proper development.

The canonical status of the Russian Orthodox Church in America, at the present time, is determined by two facts: the termination of administrative ties of this Church with the Moscow Patriarchate, which took place in 1933, result-

ing from the demand of the latter concerning loyalty to the Soviet government; and the subordination, in 1937, to the Russian Synod Abroad, on the condition that it remain a Metropolitanate District under the jurisdiction of the Russian Synod Abroad. At that time the Russian Synod Abroad had its permanent seat in the territory of Jugoslavia, as was definitely specified in the Temporary Status on administration of the Russian Orthodox Church Abroad, and operated with the blessing of the Serbian Patriarch. Resulting from this, the Synod, and through it, the subordinated Russian Orthodox Church in America, was in the necessary canonical communion with the Universal Orthodox Church.

Since then, the situation has changed altogether. During the war, the Russian Synod Abroad was forced to leave Jugoslavia, and at the present time has established itself in Munich. It no longer has the blessing of, and protection of the Serbian Church, and because of this, has lost ties with the Universal Church.

[fol. 409] From the Metropolitanate Districts under the Synod, two have gone under Moscow: the Far Eastern—excepting 20 parishes in the Shanghai Diocese; and the Near Eastern—excepting a few widely separated parishes. The third branch of this jurisdiction, composed of West European parishes, which submitted themselves to Metropolitan Serafim, suffered a heavy loss by submission to Moscow of the latter with a part of its parishes. This loss is not counterbalanced by formation of a line of new parishes in the English and American Zones of Germany, because these parishes, by their nature, are temporary and must close after re-settling the displaced persons beyond the borders of Germany, to which they persistently aspire. As a result, the only Church subordinated to the Synod Abroad, is the Russian Orthodox Church in America, with incidental additions.

Subordinating ourselves to this Synod, our Church, in substance, subordinates itself to a group of bishops, who really have no jurisdiction themselves. Because of this, some people are inclined to speak only of our cooperation with the Synod. This term "cooperation" however, is not correct, because the acts of 1936-1937 definitely subjugated our Church under the Synod Abroad.

The subjugation, at the present time, is shown by mentioning at services Metropolitan Anastasius as the presiding hierarch of the Russian Church Abroad in those instances, when, according to the rules, the head of the autocephalous Russian Church, the acceptance by our bishops of the elevation to the rank of Archbishop from the Synod, in confirming many honors upon the clergy of our Metro- [fol. 410] politanate District after receiving requests from us, in the oath of loyalty by the newly consecrated bishop for Alaska to the Synod, etc.

But, independent from this, whether our Church subjugates itself to the Synod, or only cooperates with it, the basic fact is, this: at the present time the Russian Synod Abroad has no canonical foundation, and any ties with it do not add to the canonical status of our Church. The existence of a branch of the Orthodox Church without communion with the Universal Orthodox Church is permissible only as a temporary status—for such a temporary independent status, separate dioceses of the Russian Church and groups were authorized by the well known decree of Patriarch Tikhon in 1920. A diocese or groups of dioceses may live and administer their affairs by this decree only when it can be shown that it is impossible to establish canonical validity.

For the Russian Orthodox Church in America, the most natural course towards rehabilitation is its return to a canonical subordination to the Mother Church of Russia, with which the American Orthodox people never wished to break their ties, always ready to spiritually participate in its service to Christ.

Such a return seemingly became possible following the Moscow Church Sobor in 1945 and the decree No. 94 of Patriarch Alexy on the stipulations and order in re-establishing canonical ties between the Patriarchate and the Russian Orthodox Church of America. We know also, of the difficulties which arose on the road toward realization of the Ukaz.

The difficulties may be defined by two facts. First—the indisputable nearness of the present higher hierarchy of [fol. 411] the Russian Orthodox Church, even though in no respect has it digressed from the dogmas of Orthodoxy, towards the Soviet government, expressed in many declara-

tions not only by the hierarchs but also by the chairman of the Committee on Russian Orthodox Church Affairs, Karpov. The second fact—the great majority of the members of the Russian Orthodox Church of America are American citizens and their organic ties with the political and public order, thus its roots differ from those accepted in contemporary Russia.

These two facts do not preclude any canonical subordination of our Church to the Moscow Patriarchy, but force us to insist on receiving for our Church a wide autonomy which would remove all influence of the Soviet government, direct or indirect, on our Church.

Some circumstances relating to the near past, demand extreme caution. For instance, the Moscow Patriarchate appointed Archbishop Foti of Orlov as assistant to Metropolitan Eulogius, who certainly could not have a clear understanding about the different conditions of church life in Russia and a democracy's, and for this reason he could not direct the church life of the Russian people, residing in Western Europe, in channels demanded by such conditions. This is shown vividly by the attempt of the Moscow Patriarchy, following the death of Metropolitan Eulogius, to appoint as his successor Metropolitan Serafim, not taking into consideration the wishes of the flock, nor the canonical rights of the Universal Patriarch.

Lastly, the St. Nicholas Cathedral in San Francisco, under the jurisdiction of Metropolitan Benjamin and through him the Moscow Patriarchate attempted to intro- [fol. 412] duce new parish by-laws, which was accepted by the Moscow Sobor in 1945, which almost abolishes the right of electing leaders, which was promulgated by the all-Russian Sobor of 1917-1918 according to an American standard which is in harmony with conditions of life in democratic America.

Besides, this reform is promulgated notwithstanding the fact that in the above-mentioned new parish by-laws was a reservation stating that the by-laws are not applicable in dioceses outside of Russia.

This is no place to draw up a project of full and detailed conditions of autonomy, which in its general form, is foreseen in the Patriarchal Ukase #94, which in substance needs explanation and addition. Demanding autonomy, we

do not mean autocephaly, that is, permission to organize a new, fully independent local Church. But this autonomy should go as far as the autonomy, enjoyed by the Churches of Estonia, Latvia, and Finland by decree of Patriarch Tikhon, and the Universal Patriarch, and similar to the autonomy of the West European Exarchate, headed by Metropolitan Eulogius within the jurisdiction of the Universal Patriarchate. The autonomous part of the local Church recognises as its spiritual head the first hierarch of the Mother Church, recognises his guidance in affairs of faith and sacraments, receives from him Holy Myrrh, and sent to him for his information accounts of its activities. But this autonomous part decides its own internal order, without interference of the Patriarchy, and selects its own first hierarch, allowing the Patriarchate the right to point out canonical impediments and, if any are pointed out, he may demand new elections. Recognising ourselves [fol. 413] canonically dependent on the Moscow Patriarchy, the Russian Orthodox Church of America should announce severance of its subordination to the Russian Syno[illegible] Abroad, although this severance should not prevent us fr[illegible] continuing to give material aid to the clergy and parishes, grouped around Metropolitan Anastasius, or from giving due credit for their valuable work in serving the spiritual needs of the Russian fugitives in Germany. The above-mentioned declaration is a logical basis for a sincere effort in re-establishing our canonical unity with Moscow, because, it is understood that our Church cannot at the same time be subordinated to Moscow and to the Church hierachy which assumes to represent the legal Russian Church. This assumption, so far, has not been supported by a single local Orthodox Church and for this reason does not give the Synod any ties with Universal Orthodoxy. In substance, this assumption canot be justified, because the Moscow Patriarchate has in no way digressed from the dogma, canons or the rites of Orthodoxy although adherence to a political line, for which it is often critjcized today, cannot be the deciding influence concerning its canonical status. It is permissible canonically, to give the Russian Orthodox Church of America that wide autonomy referred to above? It is undoubtedly permissible. Towards the end of 1943 Patriarch Sergius gave the Church

of Georgia not autonomy, but autocephaly, based on the fact that Georgia is a separate country with its own territory and government. The United States also is a separate country from the U. S. S. R. with its own territory and government, and if to a former part of the Russian Church, situated in a separate country, (although at the same time forming a part of the U. S. S. R.) was given [fol. 414] much more autocephaly, then it is understood, our church should get the lesser, that is, autonomy.

The second question is whether the Moscow Patriarchate will agree to give a wide autonomy to the Russian Orthodox Church in America, which is essential for its peaceful development. We fervently hope that it will agree. If, however, during the course of the negotiations it will become evident that canonical unity with Moscow cannot be re-established on these conditions, our Church will continue to live as a part, temporarily but only externally separated from the Russian Church, in the hope and a strong will for re-uniting as soon as this may become possible. Based on the reason set above, the following plan of action appears to be necessary:

(1) The Russian Orthodox Church of America at its Sobor expresses a strong wish to re-establish its canonical unity with Moscow, on condition of a wide autonomy and enters into negotiations towards this end.

(2) Until the time when the conditions of autonomy, acceptable to both parties, and acceptance by authorized organs, the Russian Orthodox Church of America continues in its present temporary independent status.

(3) The Russian Orthodox Church of America at its Sobor declares, that because of changed conditions, it recognizes the agreement with the Synod Abroad terminated and does not consider itself subordinated to the latter.

New York, Oct. 18, 1946.

Prof. M. Karpovich, Prof. G. Fedotov, Prof. N. Timashev, Peter Zubov, George Novitzky.

[fol. 415] DEFENDANTS' EXHIBIT J FOR IDENTIFICATION

NEW YORK SUPREME COURT, NEW YORK COUNTY

SAINT NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH IN NORTH AMERICA, *Plaintiff*,

against

JOHN KEDROFF, *et al.*, *Defendants*

The Case of the Missing Injunction

In response to Mr. Arkush's affidavit, I submit the following memorandum:

Plaintiff says that in June or July, 1926, it was temporarily enjoined, on Kedrovsky's motion, from interfering with his possession of the Cathedral. However, the original or even a copy of this injunction is unavailable, and Mr. Arkush in his affidavit seeks, in the latest who dunnit fashion, to reconstruct the terms of the missing injunction.

Needless to say, much of the affidavit is necessarily hearsay, conclusion and speculation—beyond the range of cross-examination. Nevertheless let us consider what Mr. Arkush's research comes to.

I have examined the file which Mr. Arkush has collected and it consists of (1) some letters, (2) some legal memoranda, (3) a copy of Kedrovsky's complaint against plaintiff, (4) a copy of the affidavits submitted by plaintiff in [fol. 416] opposition to Kedrovsky's motion and (5) miscellaneous papers. However, Kedrovsky's moving papers for the injunction were not in the file. Mr. Frink, who was Kedrovsky's attorney, is dead and his files are unavailable to me.

It appears that in an obvious (and I think unworthy) attempt to circumvent the judgment affirmed by the Court of Appeals in the *Kedrovsky* case, plaintiff purported to appoint one, Basalyga, who, I think, was one of its trustees, as alleged custodian of the Cathedral and he claimed that, since he was not a party in the *Kedrovsky* case, the judgment therein was not binding upon him. Plaintiff also brought a dispossess proceeding in the Municipal Court against Kedrovsky.

Kedrovsky then brought an action in this Court against plaintiff and its trustees to enjoin them from interfering with his possession of the Cathedral, sanctioned by the Kedrovsky judgment. That action, as the caption shows, was brought by him, "as Archbishop", and the acts complained of were that plaintiff and its agents (Par. 5 of his complaint) "have excluded and attempted to exclude" him from the Cathedral, and "have interfered and have attempted to interfere with his conducting religious services and other official activities" therein. The complaint made no mention of the Municipal Court proceedings.

Mr. Greaves, in his affidavit submitted by plaintiff in opposition to Kedrovsky's motion, stated that Kedrovsky "does not ask to stay or enjoin the Municipal Court proceedings".

Judge Mullan seems to have granted the motion for an injunction, but what are its terms? We don't know. If the counter-order which was not signed is a clue (as plaintiff seems to think) the injunction restrained plaintiff [fols. 417-425] "from interfering in any way with the occupancy" of the Cathedral by Kedrovsky or his agents "and from interfering in any way with his or their performing religious services and official activities on said premises".

As we have seen, the complaint alleged a *physical* interference with Kedrovsky's occupancy and use, and the injunction (if plaintiff's reconstruction be accepted) enjoins such *physical* interference. There is no injunction against bringing summary proceedings or ejectment. No such injunction was ever sought, as Greaves stated, *supra*, page 2:

[The foregoing exhibit consists of the first three pages of a memorandum submitted by the defendants' attorney in response to the affidavit of plaintiff's attorney (Plaintiff's Exhibit 7-C for identification.)]

(Opinion of Judge Botein, Trial Court, is omitted in printing. It is printed as Exhibit D to the Statement as to Jurisdiction.)

[fol. 426] IN SUPREME COURT OF NEW YORK

STIPULATION AS TO CERTAIN EXHIBITS DEEMED MARKED FOR IDENTIFICATION

It is hereby stipulated and agreed by the plaintiff and the defendants, through their respective attorneys, as follows:

1. The unsigned form of order appearing in the files of the Clerk of this Court in the action entitled "John S. Kedrovsky, as Archbishop of the North American diocese of the Russian Orthodox Greek Catholic Church and as delegate of the Holy Synod of said church, Plaintiff, against St. Nicholas Cathedral of the Russian Orthodox Church in North America, *et al.*, Defendants"; County Clerk's No. 21435/26, which was received in evidence and deemed marked Plaintiff's Exhibit 7 (Sten. Mins., p. 158) and later struck from the record (Sten. Mins., p. 203), shall be deemed marked Plaintiff's Exhibit 7 for identification.

2. The memorandum of Ralph M. Frink, Plaintiff's attorney, entitled "Memorandum on Settlement of Order" appearing in the Clerk's file of said action bearing file No. 21435/26 shall be deemed to have been offered in evidence at the trial on behalf of the Plaintiff, objected to on behalf of the Defendants as irrelevant and immaterial, excluded by the Court and marked Plaintiff's Exhibit 7a for identification.

3. The Affidavit of Ralph Montgomery Arkush, sworn to November 28, 1947, shall be deemed to have been offered in evidence at the trial on behalf of the Plaintiff, objected to on behalf of the Defendants on all grounds (but not be-
[fol. 427] cause of the failure to offer the oral testimony of the witnesses or the originals or whole of the documents therein referred to), excluded by the Court and marked Plaintiff's Exhibit 7c for identification.

4. The first three pages of the Memorandum of the Defendants' Attorney herein entitled "The Case of the Missing Injunction", submitted in response to the Affidavit of Arkush, above mentioned, shall be deemed to have been offered in evidence at the trial on behalf of the Defendants, objected to on behalf of the Plaintiff on all grounds (but not because of the failure to produce the oral testi-

mony of the witnesses or the originals or whole of the documents therein referred to), excluded by the Court and marked Defendants' Exhibit J for identification.

Dated: February 27th 1948.

Ralph Montgomery Arkush, Attorney for Plaintiff.

Philip Adler, Attorney for Defendants.

So ordered: B. B., J. S. C.

March 1, 1948.

[fol. 428] Supreme Court of New York, Appellate Division—First Department

Stipulation Waiving Printing of Certain Exhibits

It is hereby stipulated that the printing of Plaintiff's Exhibit 5, 6A, 13, 14, 15, 18, 18A and 19 and Defendants' Exhibit B be dispensed with; that said exhibits or copies thereof may be handed up to the Court by either party on the argument or submission of the appeal herein or, in the case of Plaintiff's Exhibits 6A, 18 and 18A, the Court may be referred to copies of said exhibits appearing in the printed Case on Appeal in *Kedrovsky v. Rojdesvensky* (opinion reported at 214 App. Div. 483) and that said exhibits and the contents thereof may be referred to by the parties in their briefs and upon argument as fully as though set forth in the printed Case on Appeal.

Dated: August 5, 1948.

Ralph Montgomery Arkush, Attorney for Plaintiff-Appellant.

Philip Adler, Attorney for Defendants-Respondents.

So Ordered: D. W. P.

[fols. 429-430] Stipulation and Order Settling and Filing Case—omitted in printing.

[fols. 431-432] Notice of Appeal to Court of Appeals—omitted in printing.

[fols. 433-434] Order of Affirmance of Appellate Division —omitted in printing.

[fol. 435] Judgment of Appellate Division—omitted in printing.

[fols. 436-489] (Opinions of Appellate Division omitted in printing. They are printed as Exhibit C to the Statement as to Jurisdiction.)

[fol. 490] Stipulation Waiving Certification in Court of Appeals—omitted in printing.

[fol. 491] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 492] IN COURT OF APPEALS OF NEW YORK

SAINT NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH IN NORTH AMERICA, *Appellant*, v. JOHN KEDROFF and BENJAMIN FEDCHENKOFF, as Archbishop of the Archdiocese of North America and the Aleutian Islands of the Russian Orthodox Greek Catholic Church, *Respondents*.

Decided November 30, 1950

Appeal from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered January 25, 1950, affirming, by a divided court, a judgment of the Supreme Court in favor of defendants, entered in New York County upon a dismissal of the complaint by the court at a Trial Term (Botein, J.; opinion 192 Misc. 327) without a jury, at the close of the entire case.

Ralph Montgomery Arkush for appellant.

Philip Adler for respondents.

Conway, J. In 1903, a church was built at 15 East 97th Street in New York City, title to which was held by a corporation, created in 1899 under the Religious Corporations Law of this State and named "Russian Orthodox St.

[fol. 493] Nicholas Church in New York". The church was constructed with funds supplied partly from abroad and partly from local contributions and it was dedicated to the use of the members of the local congregation of the Russian Orthodox Church in New York City established in 1893. Two years later in 1905, the See of the Russian Orthodox Diocese of North America and the Aleution Islands was transferred from San Francisco to New York and St. Nicholas Church became a cathedral occupied by the ruling bishop of the North American Diocese and dedicated to the use of all the members of the diocese as a central place of worship of the Russian Orthodox Church in North America. This cathedral is the subject of the present controversy. Simply stated, it is our duty in this action to identify the true and proper beneficiaries at the present time of such dedication of the cathedral so that there may be proper administration of this religious trust. In approaching that task, it is vital to our inquiry that we understand the history and organization of the Russian Orthodox Church, and the origins of its difficulties in modern times as disclosed in the record here and the record in *Kedrovsky* v. *Rojdesvensky* (242 N. Y. 347), which was submitted to us upon the argument.

The Russian Orthodox Church is one of that loosely knit group which generically is referred to as the Eastern Confession or the Eastern Orthodox Church—an allusion to the rupture of the eastern and western portions of the Catholic church in 1054. The Russian church originally was subject to the Patriarch of Constantinople but acquired greater autonomy when Constantinople fell to the Turks and the Metropolitan of Moscow was no longer appointed by the Patriarch of Constantinople but was elected by the Russian bishops. Finally, express recognition of the "autocephaly", i.e., the complete independence, of the Russian church came in the 16th century when the Metropolitan of Moscow was raised to the dignity of Patriarch. The Patriarch ruled the church until 1700 when Peter the Great forbade the election of a new Patriarch and established the Most Sacred Governing Synod, consisting of a Procurator appointed by the Czar, and several metropolitans and bishops, to govern the church in place of the Patri-

[fol. 494] arch. This form of church government continued for over two hundred years, until 1917.

During that period, the Russian Orthodox Church conducted missionary activities in many parts of the world. A mission was established in 1793 in the then Russian territory of Alaska, and spread down the Pacific coast. In 1870, the mission had grown to the extent that the Diocese of Alaska and the Aleutian Islands was created with its See at San Francisco. Since it extended from Alaska through Canada to San Francisco, we shall refer to it herein as the North American Diocese or as the diocese.

A New York City congregation of the Russian Orthodox Church was established in 1893, incorporated in 1899, as already noted, and completed St. Nicholas Church in 1903. In 1905, when the See of the diocese was moved from San Francisco to New York, the church became a cathedral occupied, in accordance with the rules of the church, by the ruling bishop of the diocese. Throughout that period, the paramount jurisdiction of the Most Sacred Governing Synod in Russia over the North American Diocese was recognized and unquestioned.

Such was the condition of the Russian Orthodox Church and its North American Diocese until 1917—the year of the Kerensky revolution in Russia.

Following the overthrow of the czarist regime, a great "Sobor" or convention of the Russian Orthodox Church was called. This sobor of 1917-18, it is conceded here by all parties, had indisputable canonicity and validity. The sobor re-established the Patriarchate and elected thereto Patriarch Tikhon, the "arch-prelate" and "head of Church Administration", the first such since Peter the Great. The Patriarch, as the head of the Sacred Synod and of the Supreme Church Council, constituted the Supreme Church Authority and ruled the Russian Orthodox Church. Other enactments of the sobor provided a procedure for the local election of diocesan bishops and the confirmation of such election by the Supreme Church Authority. It also provided that the Patriarch might call a sobor every three years and that he should preside over it. [fol. 495] No sobor was ever called by Patriarch Tikhon (and he was the only one with power to do so) prior to his death in 1925.

Up to 1917, the ruling archbishop of the diocese had been appointed by the central church authorities. Tikhon himself, later to be Patriarch, was the diocesan archbishop from 1904 to 1907. Archbishop Platon succeeded him and ruled until 1914 when he returned to Russia and Archbishop Evdokim came in his stead. Archbishop Evdokim remained until 1917 when he too returned to Russia. All three duly appointed archbishops, in conformity with the rules of the Russian church, used and occupied St. Nicholas Cathedral, as their administrative headquarters and as a place of worship. Those three archbishops were in proper and direct canonical succession and as to that there is no controversy.

Archbishop Evdokim's departure in 1917 marked the beginning of the difficulties which have ever since beset the diocese. No discussion of the Russian Orthodox Church since 1917 is possible without constant reference to the political conditions upon which its character and its existence depended. In March of 1917, the Provisional Government of Kerensky replaced the czarist regime. The Kerensky Government itself was soon overthrown by the so-called Bolsheviki led by Lenin in the famous "October Revolution". Prior to his downfall, Kerensky, as noted, had authorized the convocation of the great sobor of the Russian Orthodox Church, which was in session through the latter part of 1917 and up to February of 1918 and which named Tikhon as Patriarch. Upon their accession to power, the Bolsheviki, in accordance with the then acknowledged and asserted principles of communism, attempted by every means at their command, to destroy religion in Russia. In the years following 1917, church property was confiscated, clergymen were killed, exiled or imprisoned, and Patriarch Tikhon himself, old and in poor health but a useful symbol, too valuable to be destroyed, was confined under house arrest and later imprisoned.

This frontal attack upon the church continued for five years. In November of 1920, however, at the height of the persecution, Patriarch Tikhon issued his now famous ukase No. 362 of 1920. This document contained "instructions to [fol. 496] the Diocesan Bishops for the case that a given Diocese be severed from the highest Church Administra-

tion, *or in case the latter's activity stop*". (Emphasis supplied.) It was provided in part that "if the highest Church administration * * * would for any reason discontinue their church-administrative activity", the diocesan bishop, either with the bishops of neighboring dioceses or, if that were not possible alone, should "assume the full hierarchical power" and "do everything possible to regulate the local church life, and if necessary, * * * organize the diocesan administration suitable to conditions created". Other paragraphs provided for the continuation of such local administration of the church if the discontinuance of activity of the highest church administration "should acquire a protracted or even permanent character". Finally, it was provided that "all measures taken locally in accordance with the present instructions * * * must be submitted for confirmation later to the Central Church Authority when it is re-established."

The apparent forebodings of Patriarch Tikhon, which prompted this ukase, proved accurate, for in the Spring of 1922 he was arrested and imprisoned. The Russian Government, then, for its own purposes, as later became evident, permitted a group of priests to visit Tikhon and they procured from him a letter authorizing the transfer of certain *business papers* of the church to a named archbishop (Agathangel) who was to be his representative. Instead of doing that, the recipients of the letter—members of a radical group styling themselves the "Living" or "Renovated" church—declared themselves to be the Supreme Authority of the Russian Orthodox Church and purported to authorize and summon the pseudo-sobor of 1923. Patriarch Tikhon later referred to them as "ambitious and willful men" who took advantage of the situation "to usurp the highest clerical power of the Russian Orthodox Church which did not belong to them," and he denounced their statements as "nothing but lies and deception". It is now conceded here that this was a schism which is now extinct. Nevertheless, while Tikhon was still in prison, this schismatic group purported to call another sobor of the church although power so to do resided only in the Patriarch [fol. 497] Tikhon, as we have seen. There is evidence that they were aided and abetted in their plan by the Russian Government which permitted them to proceed while

killing, arresting or exiling those members of the church who objected. This new pseudo-sobor met in 1923.[11] Tikhon was roundly and vehemently condemned by all the speakers. The patriarchate was dissolved and Tikhon, reviled and denounced as an apostate and traitor, was unfrocked. The church created by the pseudo-sobor of 1923 was called the "Living Church" or the "Renovated Church". It was schismatic and had no canonical validity. That fact, it should again be noted, is conceded by all the interested parties here.

The turmoil and the turbulence with which the Russian Orthodox Church was beset in Russia was not without its echoes in this country. Bishop Alexander of Canada became acting head of the diocese by designation of Archbishop Evdokim (see p. 3, herein). Several conventions were held in this country at which the status and fate of the North American Diocese were discussed and measures were proposed to preserve it from disintegration or the usurpation of pretenders. Archbishop Platon, who had ruled the diocese from 1907 to 1914, in proper canonical succession, returned to this country in 1921. He succeeded in restoring peace and order in the diocese, and prominent

[11] The minutes of its deliberations contain frequent obsequious expressions of praise of and devotion to the Soviet Government. Lenin was referred to as "the world's leader" and the Soviet Government was said to be "the only one in the world of all time of the existence of mankind, to fight actually for good and equality." A resolution was adopted which declared that the world was divided into two classes—the capitalist exploiters and the proletariat—and continued: "The Christians cannot be indifferent spectators of that battle. The Sobor declares capitalism to be a mortal sin, and a battle with capitalism to be holy to Christians. In Soviet Authorities the Sobor sees a world's leader for fraternity, equality and peace of nations. The Sobor stigmatizes the international and national counter-revolution and condemns it with all its religious and moral authority". Christians "through the entire world" were called upon to "bring into life the principles of the October Revolution."

churchmen of the diocese urgently petitioned Patriarch Tikhon to reappoint him formally as archbishop of the diocese. This was just before Tikhon was actually imprisoned. While he was technically at liberty, his visitors [fol. 498] in Moscow were being watched and interrogated carefully, and his correspondence, especially with Americans, was systematically searched. The American entreaties regarding Archbishop Platon were relayed to the Patriarch by a representative of the Y. M. C. A. who was in Moscow. The Patriarch, in the presence of another witness, Bishop Pashhovsky, assured him that Platon would be appointed the ruling bishop of the diocese and that he would issue papers to that effect. The Patriarch asked that Platon be notified immediately, but it was agreed that it would not be possible at that moment to put the appointment in writing because of the constant surveillance of the civil authorities and the fear that any such communication, if seized, would endanger the safety or the life of the Patriarch. The Patriarch's intention and will were transmitted to Archbishop Platon by the Y. M. C. A. representative and Bishop Pashhovsky. Alexander, the acting Archbishop, recognized in writing Platon's appointment as ruling bishop of the diocese, as did the bishops of the church outside Russia. Tikhon was imprisoned by the Soviet Government immediately after making this oral appointment. A diocesan convention was held at Pittsburgh in October, 1922, and after investigating the situation Platon was acknowledged as the ruling bishop. Platon accordingly took possession of St. Nicholas Cathedral and exercised administrative supervision over the diocese.

Patriarch Tikhon was released from prison in the latter part of 1923, after the pseudo-sobor of that year had completed its work. Under date of September 20, 1923, from a monastery, he signed an order directed to Platon advising him that, *with the concurrence of the Sacred Synod*, "having taken cognizance of the situation of the American Church, we deemed it necessary to appoint you to rule the North American Church."

Meanwhile, one John Kedrovsky, a priest of the Russian Orthodox Church in this country, had, in 1918, commenced an action in this State on behalf of himself and other priests against the association or corporation known as

the Archbishop and Consistory, which was a managing and advisory group handling the affairs of the diocese. In that [fol. 499] complaint Kedrovsky asserted that he was one of the clergy of the Russian Orthodox Greek Catholic Church of North America; that it was a religious denomination of about 300 churches with about 300,000 members organized in various unincorporated parishes or bodies throughout North America;[12] that his lawful archbishop was Archbishop Evdokim (Meschersky) who had departed from the United States for Russia about August 6, 1917, and had since remained there; that Alexander (Nemolovsky) was then a bishop of the church in Canada and had been assuming to act as the acting archbishop of the church pursuant to a cablegram from the lawful Archbishop Evdokim but that in truth no such appointment had been made by Archbishop Evdokim and that Alexander was therefore a usurper.

After the institution of that action, but before trial, the aforementioned *pseudo*-sobor of 1923 was held in Moscow. It created the "Living Church" or "Renovated Church", which, as noted, is now conceded to have been schismatic and uncanonical. Kedrovsky, the same priest who in his 1918 action had asserted that he was subject to Archbishop Evdokim as the true archbishop of the North American Diocese, procured from this "Renovated Church" certain credentials in the latter part of 1923. One document purported to consecrate him as North American archbishop and to excommunicate and condemn Archbishop Platon. The other documents contained Kedrovsky's formal appointment as archbishop of the North American Diocese and a full power of attorney to act for the church.

In March, 1924, he commenced another action, this time asserting that he was the lawful archbishop of the North American Diocese, in order to gain control of St. Nicholas Cathedral, the subject premises in the case at bar, which he

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[12] On the trial, he introduced in evidence an exhibit which listed deeds of 135 church properties to Bishop Alexander in Alabama, Alaska, California, Colorado, Connecticut, Illinois, Indiana, Massachusetts, Michigan, Minnesota, New Jersey, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, Washington and Wisconsin.

then conceded had been possessed by Bishop Alexander in 1919 "as the de facto or acting Archbishop". As noted, Archbishop Platon was occupying the cathedral in 1924 by [fol. 500] ~~virtue of his~~ oral appointment by Patriarch Tikhon and the written confirmation thereof in September, 1923.

In March of 1924, immediately prior to the institution of the cathedral action by Kedrovsky, a document, dated February 16, 1924, appeared in the newspapers here purporting to have been issued by the Patriarch Tikhon accusing Platon of engaging "in Public acts of Counter-Revolution directed against the Soviet Power and of disastrous consequences to the Orthodox Church". It provided for the dismissal of Platon "from the day on which this Present Decision is announced to him", by a new ruling bishop who was to be chosen. The publication of this decree, dated less than five months after the patriarchal order confirming Platon and the legal action instituted by Kedrovsky, caused bewilderment among the members of the diocese. A North American sobor was called and held at Detroit in April of 1924 to consider the situation, excerpts from the minutes of which appear in the record.[13]

[13] The purported new order of the Patriarch was compared with his recent decree confirming Archbishop Platon, the language of the new order was analyzed and found to be couched in terms similar to those used by the schismatic Kedrovsky, and there were comments upon the very serious condition of the Patriarch's health. (He did, in fact, die the next year, in April of 1925.) It was concluded that "somebody in Moscow is extracting decrees from the sick Patriarch and is using those decrees against him", and in particular that the decree of February 1924, was "undoubtedly forced by the Soviet power". Another speaker stated: "The fact that the Soviet power still tolerates Patriarch Tikhon is only because he is an achievable means of influencing opinion at home and public opinion abroad. I have not the slightest doubt that all the Patriarch now does to administer the Patriarchate he is doing under duress. Over there it is done very simply: he is summoned to the respective commissariat and presented with decrees prepared beforehand which he is 'to execute'. As everything is done

It was pointed out that the North American Diocese, for a good many years, had been "cut off from the highest [fol. 501] organ of the administration of the Russian Church" and that that situation made operative the above-quoted ukase of 1920 providing for local administration and election of bishops. The sobor then adopted resolutions asking Platon to head the administration of the church. Another resolution emphatically stated it to be the will of the sobor "not to break at all the spiritual ties and communion with the Russian Church but always to pray for her good". The "final regulation" of the status of the North American church was to be left to "a future Sobor of the Russian Orthodox Church which will be legally convoked, legally elected, will sit with the participation of representatives of the American Church under conditions of political freedom, guaranteeing the fullness and authority of its decisions for the entire Church, and will be recognized by the entire Oecumenical Orthodox Church as a true Sobor of the Russian Orthodox Church."

The second or 1924 action brought by John S. Kedrovsky reached us two years before the 1918 action brought by him. In that 1924 action there was evidence as to most of the facts already detailed. However it was not there conceded as it is now that the "Renovated Church" had been schismatic in origin and had been later absorbed by or merged with the patriarchal church, nor that the 1923 sobor was not considered as having complied with canonical requirements because it was not convened pur-

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to 'consolidate the conquests of the revolution' his refusal to comply with the demands of the Soviet power will be openly called counter-revolution and sabotage." It was said that if such forced acts of the Patriarch continued, the North American Diocese would be subject to "all kinds of surprises, which could basically undermine that church order and peace which have, with such great labor, already been practically arranged" by Archbishop Platon, and "would involve our Church here in a condition of that same anarchy under the banner of which church life in Russia exists at present * * * We must create our own firm Church administration, completely insured against possibility of the direct or indirect influence of the Soviet Power."

suant to a cal by the Patriarch and the Holy Synod. Moreover, in that action there was not before the court ukasé No. 362 of 1920 of Patriarch Tikhon. The Appellate Division (214 App. Div. 483) stated that "The validity of Kedrovsky's appointment really depends upon the validity of the second Sobor [that of 1923] as it is called." (P. 487). It then found (contrary to what is now conceded to be the fact) that the sobor was properly called and that the "Renovated Church", created by it, had the [fol. 502] power to appoint Kedrovsky as the ruling bishop of the North American Diocese. When the appeal from that decision reached us we treated it as one involving only questions of fact as to whether (1) there was a governing body of the church and whether (2) that governing body had recognized Kedrovsky as archbishop of the church. We determined that there was evidence to sustain the findings of the Appellate Division on both of those points. We thereupon affirmed the judgment, one Associate Judge being recorded as absent. (*Kedrovsky* v. *Rojdesvensky* [1926], 242 N. Y. 547.) The control of all phases of Russian life by the Government was not as apparent in 1924 as it is a quarter of a century later and on the surface, at least, the case appeared to be a proper one for the application of the rule that in an ecclesiastical dispute involving a denominational church, the decision of the highest church judicatories will be accepted as final and conclusive by the civil courts (*Trustees of Presbytery of N. Y.* v. *Westminister Presbyt. Church*, 222 N. Y. 305, 315; *Watson* v. *Jones*, 13 Wall. [U. S.], 679, 724-727; Religious Corporations Law, §§ 4, 5.)

Two years later there was presented the original or 1918 action commenced by Kedrovsky, as a priest of the patriarchal church, on behalf of himself and all others similarly situated. It had been brought against the "Archbishop and Consistory of the Russian Orthodox Greek Catholic Church, alleged corporation", and others. Archbishop Platon (Rojdesvensky) was again an appellant. In that action a receiver *pendente lite* had been appointed and the judgment at Special Term directed that the defendant Platon and other defendants deliver over to such receiver, who in turn was directed to deliver to plaintiff

John S. Kedrovsky, all the properties and deeds thereto held by Bishop Alexander and conveyed by him to the general board of trustees by the exhibit dated June 7, 1921, which listed and enumerated all of the 135 church properties in the nineteen States and the territory of Alaska heretofore referred to. That judgment was unanimously affirmed by the Appellate Division. We, however, granted leave to appeal. The decision of the Appellate Division there was correct and unassailable if by our affirmance in [fol. 503] *Kedrovsky* v. *Rojdesvensky* (242 N. Y. 547, *supra*), we had adopted the view that the properties of the North American Diocese were required to be administered by an appointee of the central authorities of the patriarchal church as it then existed in Russia, whatever the status and characteristics of the church there might be, and that Kedrovsky had been validly appointed by such authorities. We, however, declined so to consider our earlier affirmance in the cathedral case two years before. Realizing that the legitimate claims of the North American Diocese, whose temporary autonomy had but recently been declared, were entitled to consideration under the circumstances disclosed, we unanimously reversed the judgments below. (*Kedrovsky* v. *Russian Catholic Church* [1928], 249 N. Y. 75.)

We pointed out that the title to the properties "was either in Archbishop Nemolovsky [Alexander] for the benefit of the faithful of the church within his diocese, or in the defendants [Platon and the general board of trustees] to whom he attempted to transfer his trusts * * *, or in the faithful of the church themselves." (p. 77.) We further noted that in none of those views was title in the members of the Consistory, then headed by Kedrovsky. Then, taking cognizance of the doubt as to Kedrovsky's status as archbishop by appointment of the "Renovated Church", and of the declaration of administrative autonomy by the American church at Detroit in 1924, we said (pp. 77, 78): "In view of the dissensions that have arisen, the Supreme Court may well conclude that the title should be vested in some other trustee who may be relied upon to carry out more effectively and faithfully the purposes of this religious trust (*Carrier* v. *Carrier*, 226 N. Y. 114).

Whether such trustee should be the plaintiff, who is the present Archbishop, or the incorporated Archbishop and Consistory, or some one else, we do not now determine. This question is one to be passed upon by the Supreme Court in its discretionary supervision of the conduct of trustees. That discretion has not been exercised by any judgment yet pronounced. * * *"

That 1928 decision by this court thus recognized that [fol. 504] the difficulties of the Russian Orthodox Church in this country differed substantially from the situations presented in the *Westminster* and *Watson* cases (*supra*), and that those cases were not helpful in the solution of the problem. The problem, indeed, was one which strained the limits of judicial power, and, we deemed it proper to return the case to the Supreme Court leaving it to that court, after full consideration of the facts, in the exercise of its discretionary power, to achieve a result whereby the faithful of the Russian Orthodox Church in this country might enjoy their accustomed religious temporalities under the supervision of trustees who might "be relied upon to carry out more effectively and faithfully the purposes of this religious trust".

While this litigation was in progress, the Soviet sponsored "Renovated Church" was the only one permitted to function in Russia, the central office of the patriarchal church being suppressed by the Government. Despite this State assistance, the "Renovated Church" had no popular following and few adherents outside its own clergy. In a few years it joined with and was absorbed by the patriarchal church. For two years, after Tikhon's death in 1925, there was no Patriarch of the Russian Orthodox Church. Then in 1927, one Sergius, the Metropolitan of Moscow, made peace with the Soviet Government and concluded an agreement with it under which the central office of that church was permitted to reopen, after acknowledging its "loyalty" to the Government and promising to secure similar written pledges of loyalty from the clergy of the church abroad. No election to fill the office of Patriarch was permitted. Instead, Sergius was appointed the acting *locum tenens* of the patriarchal throne. Unsuccessful discussions subsequently ensued with

a view toward reuniting the North American metropolitan district with the patriarchal church.[14]

Under the leadership of Metropolitan Platon following the creation of the administratively autonomous metropol- [fol. 505] itan district by the Detroit sobor of 1924, to which reference will be made hereafter, the church grew and prospered. With the exception of schismatics such as Kedrovsky, who was recognized by no one but who occupied St. Nicholas Cathedral by virtue of the decision and injunction of 1924, the North American church followed Metropolitan Platon. In 1933, the Acting *Locum Tenens*, Sergius, dispatched one Benjamin (Fedchenkoff) to the United States in order to take over the administration of the metropolitan district from Platon, whose proclamation of autonomy was declared to be "null and void". Sergius also purported to excommunicate Platon and all the clergy and laymen who followed him, until they submitted themselves to the jurisdiction of the patriarchal Exarch Benjamin (in America), or directly to the Acting *Locum Tenens* (in Moscow). Finally in 1934, Sergius appointed his ambas-ador, Benjamin, as "permanent Ruling Bishop of the Russian North American Diocese". The text of the order contains a recital that Benjamin had "organized in New York a Diocesan Council and that our *North American Diocese has begun official existence*". This would appear to be a significant admission that the former North American Diocese, which had by that time become a metropolitan district, had achieved practical administrative autonomy and that it was necessary for the Russian church to organize a new diocese. By 1945, the number of parishes which recognized the new diocese set up by Benjamin in 1934, and which we must assume, in view of the provi-

[14] The position of the Russian church in America appears to have been that no such pledge of loyalty to the Russian Government as demanded could be given by the clergy here and that the church in Russia was becoming a slave to the atheistic Russian Government and was aiding it in its fight against all religion. In view of those conditions, the Russian church here felt it had no alternative but to insist upon temporary autonomy envisaged by the ukase No. 362 of 1920.

sions of the Religious Corporations Law since 1875, were organized for the purpose of adhering to such new diocese set up by Benjamin, was only 13, while those adhering to the autonomous metropolitan district were said to total 358.

Platon died in 1934 and another sobor of the American church convened at Cleveland. Bishop Theophilus (Pashkovsky) was elected as ruling bishop and has served as such since. The temporary autonomy of the North Ameri-[fol. 506] can metropolitan district created in 1924 was re-affirmed, and rules for the administration of parishes were adopted. Another sobor at New York in 1937 again confirmed the temporary autonomy of the North American metropolitan district. The central church authorities in Moscow immediately issued a decree suspending and excommunicating Bishop Theophilus.

In 1934, John S. Kedrovsky, the schismatic, also died, but his son, Nicholas, continued to occupy the St. Nicholas Cathedral, even though by that time the "Renovated Church" had ceased to exist. Nicholas remained there until 1944, when he too died, and possession of the cathedral passed informally to his brother, John, who claimed to be a priest by virtue of an ordination of the "Renovated Church".

In 1940, the status of the metropolitanate again came before this court in *Waipa* v. *Kushwara* (259 App. Div. 843, motion for leave to appeal denied 283 N. Y. 780). That was a suit to oust a priest from a Russian Orthodox Church in Yonkers, N. Y. He had been suspended by Archbishop Theophilus of the metropolitan district and in the civil action brought against him, he defended on the ground, among others, that Benjamin, the appointee of the Moscow Patriarchate and not Archbishop Theophilus, the elected metropolitan, had the power and authority to administer the affairs of the church here. The lower courts rejected that contention, finding authority for the creation of the administrative autonomous metropolitan district in the ukase of 1920 of Patriarch Tikhon which was to continue "until such time as the existing civil authorities * * * would cease interfering with the church". (N. Y. L. J., Jan. 6, 1940, p. 97, col. 5.) We denied leave to appeal.

Following the invasion of Russia by Germany in 1941,

the Soviet Government, fighting for survival, apparently found it expedient to permit a somewhat broadened area of activity to the Russian Orthodox Church in that country. Then, following the death of Sergius in 1944, it consented to the convening of a sobor at Moscow in January of 1945. The news which was permitted to seep out of Russia after 1941 encouraged the hope in the members [fol. 507] of the metropolitan district that unity might again be found.[15]

Suddenly, without advance notice, an invitation was received for the North American church to be represented at the new sobor in Moscow. Four delegates were hurriedly chosen—three clergymen and one layman, the attorney for the church—who made preparations to travel to Alaska, from which place the Russian Government was to provide transportation to Moscow. After two of the clergymen had started, the Soviet Government cancelled the visa of the attorney on the pretext that entry was permitted only to clerical persons—a restriction which was not observed with reference to the delegation from Yugoslavia. The two clergymen who had already left were met by a Russian airplane which was to carry them to Moscow. Instead, they were landed in Siberia and transferred to a train to continue their journey. As a result, they arrived in Moscow ten days after the sobor had adjourned.

They found that one Alexy had been named Patriarch of the Russian Orthodox Church, and they presented to him a report of the church in North America and a request for the lifting of the spiritual separation on terms of autonomy. In return, they were handed a prepared document, the so-called ukase of February, 1945, for delivery to Metropolitan Theophilus. The terms of this ukase were not acceptable to the North American church. Instead of the necessary autonomy, the ukase provided for the calling of a sobor in America to be presided over by an archbishop sent from Russia. The sobor was to be required

[15] As stated in an official report of the metropolitan district, "It seemed, in form at least, that the mother church was being restored to a position of dignity and usefulness. * * * The time appeared to be ripe for a discussion of the terms on which the two churches might be reunited."

to declare in the same of the church "its abstention from political activities against the U. S. S. R. and give corresponding orders to all parishes". There was no comment or provision concerning the status of Metropolitan Theophilus, the elected head of the North American church. Instead, the sobor was to be required to elect a new person [fol. 508] to be head of a new metropolitan district. Two representatives of the then Moscow Patriarchate were recommended as candidates for the position, and the right was reserved to refuse confirmation of the person chosen "if he be considered unsuitable by the Patriarchy, for any motivated reason whatsoever". There was an intimation that "some extended powers" might be given to the person so chosen and confirmed, "but the right to confirm candidates for bishop, the right to reward the clergy with higher titles, and the right of appeal as regards bishops, clergy and others, remain with the Moscow Patriarchy."

A council of the bishops of the North American metropolitan district met in May, 1945, and decided that the terms proposed in the ukase of February, 1945, were not acceptable.[16]

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[16] In an official report to the clergy and laymen, published in July, there was a full discussion of the background and necessity of the 1924 declaration at Detroit of temporary autonomy for the North American metropolitan district. Reference was made to the recent efforts at unity, the chicanery by which the American delegates were prevented from attending the Moscow sobor, and the substance of the ukase then issued. The report emphasized that the metropolitan district considered itself as part of the Russian church and desired that the suspension be lifted. It was pointed out, however, that the text of the ukase disclosed that the Moscow patriarchate had "little conception of the conditions of church life in this country, and of the atmosphere of religious and political freedom in which the American Church has developed." Then followed a point-by-point analysis of the ukase. One of the major obstacles was the insistence of the patriarchy upon renunciation of political activities against the U. S. S. R. The report said: "It would be inconsistent with the duties and obligations of loyal American and Canadian citizens, and contrary to the

The attempts at reconciliation having met with failure, the metropolitan district decided to commence this action to recover possession of St. Nicholas Cathedral, which by [fol. 509] custom and rule had always been the See of the Russian Orthodox Church in North America and the residence and place of worship of the ruling bishop of the church in North America. Technically, the plaintiff in this action is the corporation, "Saint Nicholas Cathedral of the Russian Orthodox Church of North America". When the land for the proposed cathedral was acquired in 1899, title was taken in the name of a religious corporation organized pursuant to the Religious Corporations Law of 1895 (L. 1895, ch. 723, § 50) which provided that the incorporators of such Orthodox churches should be, by virtue of office, the Russian Ambassador and the Consul-General. This corporation, so formed, retained title until 1925, with the exception of one year (1916-17) when title was temporarily placed in the name of the then ruling Archbishop Evdokim to whom John S. Kedrovsky, when he brought his 1918 action, was subject as a priest and whom, he in his complaint, recognized as the true head of the North American Diocese.

In 1925, a special act of the New York State Legislature (L. 1925, ch. 463) created the plaintiff corporation, composed of Metropolitan Platon and others of the metropolitan district, to which the old or 1899 corporation transferred the cathedral property. The deed was signed by the Russian Consul General, but not by the other statutory incorporator, the Russian Ambassador, as we did not then recognize the Russian Government in that country. That

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traditional atmosphere of freedom of speech and political action in these countries, for the Russian Church in America to give the pledge of loyalty to a foreign power which is implicit in the demand of the Patriarchal Ukase." Another stumbling block was the vagueness of the ukase as to the powers of the North American church. It was felt that "the precise nature of the relationship between the two churches should be defined in advance. This is particularly necessary in view of the precarious situation of the mother church, existing as it does by sufferance of a totalitarian regime."

necessary defect was cured, and all such deeds validated by a subsequent act of our Legislature. (L. 1942, ch. 206.) Moreover, the corporate existence of the plaintiff corporation was specifically confirmed by still another act of our Legislature (L. 1945, ch. 817), "notwithstanding any non-user by said corporation of its corporate rights, privileges and franchises or the lapse of any period of time during which said corporation was inactive." The plaintiff corporation, accordingly, is the present owner of the record title to St. Nicholas Cathedral. This is not, however, the ordinary ejectment action, in which proof of such title and of an ouster would constitute ground for relief. Since 1875 (L. 1875, ch. 79) our Legislature has provided for the denominational control and administration of church prop-
[fol. 510] erties a... temporalities. (See Religious Corporations Law, § 5.) The corporate owner of the title thus holds the property *in trust* for the religious body for whose use it was dedicated. Plaintiff does not dispute this trust theory, but on the contrary relies upon it. Plaintiff has endeavored to prove that the beneficial use of the property today rightfully belongs to the Russian church in America (Religious Corporations Law, § 105) which was forced to declare its administrative autonomy at the Detroit sobor of 1924 in order to preserve and adhere to those principles and practices fundamental to the Russian Orthodox faith, free from the influence of an atheistic and antireligious foreign civil government.

The action, as stated, was commenced against John Kedroff, the second son of John S. Kedrovsky, in April, 1945. Apparently fearful of his anomalous status, as a cleric of a concededly extinct church (the "Renovated Church"), Kedroff made overtures to Benjamin, the representative of the Moscow Patriarchate, and in October, 1945, was *reordained* by Benjamin and thereupon surrendered the cathedral premises to Benjamin, as head of a new diocese of a different church.

We must remember that Benjamin never possessed or occupied the cathedral until after the commencement of this action on April 9, 1945, against the defendant Kedroff. Benjamin was not originally a party herein because he was not an occupant of the cathedral but was later permitted to intervene. Kedroff, the second son of Kedrov-

sky, was but a priest of the schismatic "Renovated Church" and thus could not have defended this action as an occupant of the cathedral. He therefore went to Benjamin, recognized him as the "Chief Church Authority", and said "Ordain me all over again" and had himself reordained as a priest by Benjamin in what must have been the latter's new diocese. When Benjamin did so reordain Kedroff as a priest, the latter "gave" the cathedral to Benjamin according to Benjamin's counsel here. Thereafter, in order to obtain an adjournment in this action, Benjamin stipulated to and did give up possession of the cathedral on June 6, 1947. At the time of the trial, when he was called by the plaintiff *only*, Benjamin was living [fol. 511] at 38 Halsey Street in Brooklyn. Benjamin was therefore an occupant of the cathedral only from October, 1945, a time subsequent to the commencement of this action, until June 6, 1947.

Kedroff had interposed a general denial to plaintiff's complaint. After Benjamin, following such surrender by John Kedroff, took over the cathedral, he was permitted to intervene and interposed the present amended answer setting up four affirmative defenses. Only the first need concern us here. The second, third and fourth defenses, i.e., nonuser and lack of authority in plaintiff, the Statute of Limitations and laches, respectively, were either ignored, abandoned or found in plaintiff's favor below. There was little or no discussion concerning them and they have been effectively eliminated from the case. The first affirmative defense sets up Benjamin's appointment and his asserted right to occupy the cathedral by virtue of such appointment to that office.

Before this action was commenced a new article of the Religious Corporations Law, 5-C, was passed by both houses of the New York Legislature. It was subsequently signed by the Governor. This legislation had a conclusive effect upon the issues presented in the case at bar and will be discussed at length below. Quite apart from this legislative action with respect to the specific dispute here involved, we think that, as a matter of common law as intimated by our 1928 decision in *Kedrovsky* v. *Russian Catholic Church* (245 N. Y. 75, *supra*), there was ample basis and room for an exercise of the discretionary power

of the Supreme Court over the conduct of trustees, in favor of the North American metropolitan district. We think that in the light of historical facts and the evidence in the records before us, the conclusion would have been fully warranted that the leaders of the North American metropolitan district are the trustees "who may be relied upon to carry out more effectively and faithfully the purposes of this religious trust" (pp. 77-78), i.e., who may administer the temporalities of St. Nicholas Cathedral for the benefit of the faithful for whose use it was originally dedicated.

The courts below, in granting judgment herein to de- [fol. 512] fendants, did not determine, in the exercise of their discretion, whether defendants could be relied upon to carry out faithfully and effectively the purposes of the religious trust. The *Westminster* and *Watson* cases (*supra*), were cited and the conclusion drawn that St. Nicholas Cathedral must be occupied by an archbishop appointed by the central authorities in Moscow and that Benjamin, who was so appointed, was therefore, entitled to the possession of the cathedral. This, we think, was error. The determinative issue in the case, apart from the action of the Legislature with respect to the problem, was whether there exists in Moscow at the present time a true central organization of the Russian Orthodox Church capable of functioning as the head of a free international religious body. If the Moscow patriarchal throne has been resurrected by the Soviet Government solely as a means of influencing opinion at home and abroad, and if it may now operate on an international scale, not as a true religious body, but only as an extension or implementation of Russian foreign policy, then it is clear that the North American metropolitan district and not the appointee or ambassador of the central authorities in Moscow, is the proper trustee to manage for the benefit of the faithful in this hemisphere those religious temporalities dedicated to the use of the Russian Orthodox mission and diocese prior to 1924 when it became an administratively autonomous metropolitan district. (Religious Corporations Law, § 105.)

We know that a nominal church organization exists in Russia, but that is not enough. We are told—by the *only*

witness called by the defendants and one who supplied the *only* testimony to this effect—that "from 1925 to date, the church has received greater liberty and is functioning freely as an orthodox church, without interference by the civil authorities, and the political views held by the authorities, *and any atheistic sentiment that they may have in no way interferes* with the unhampered activities of the Russian Orthodox Church." On the other hand, plaintiff urges that, willingly or not, the Moscow patriarchy is unable to conduct "church-administrative activity" except as an arm of the Russian Government to further its domestic and foreign policy; that that is a fact publicly recognized [fol. 513] by our President and our State Department; and that it is attested to and demonstrated in the records submitted to us by (1) the imprisonment of Patriarch Tikhon, (2) the suppression of the patriarchal church during the days of the State-supported schism of the "Renovated Church" and (3) by the later re-establishment of an enfeebled patriarchate, when the "Renovated Church" had served its purpose, willing to pledge its loyalty to the Russian State and to attempt to exact a similar pledge from clergy abroad. Having in mind the warning of Lord COLERIDGE, in *Lumley* v. *Gye* (2 El. & Bl. 216, 267), "Judges are not necessarily to be ignorant in Court of what everybody else, and they themselves out of court, are familiar with", we feel we must accept the historical statements contained in the dissenting opinion of Mr. Justice VAN VOORHIS below: "* * * In recent public pronouncements the State Department, and our representatives in the United Nations, have frequently recognized and denounced the suppression of human rights and basic liberties in religion as well as in other aspects of life, existing in Soviet Russia and in all of its satellite states. The President of the United States has publicly characterized such efforts as a campaign to turn religion into a tool of the state (Armistice Day Address, November 11, 1949)." (276 App. Div. 309, 330.)

Everyone agrees that the Russian Orthodox Church has continuously existed down through the centuries, for no communicant would concede that the suppression of the church by the Soviet Government had ever destroyed the

patriarchy as a *spiritual symbol* of the spiritual unity of the Church as distinguished from its temporalities. Moreover, members of the North American metropolitan district admittedly revere and respect the *office* of the patriarchy, whatever may be their feelings as to the merits of the current incumbent of the office. This devotion is traditional and serves as a common bond for the members of the *Russian* Orthodox Church, as distinguished from the members of other Orthodox churches in various countries which have recognized as their spiritual heads at various times the Patriarchates of Constantinople, of Alexandria, of [fol. 514] Antioch, of Serbia and of Jerusalem. Recognition of the Moscow patriarchy by the North American metropolitan district in that sense is by no means a disavowal of the position steadfastly maintained by it down to the present day, viz., that the beloved patriarchy has been absorbed by the Russian Government and its action deprived, during the period of such domination, of any religious significance.

In short, we think that further inquiry might well have been made into the present status of the patriarchate in Russia and we think the Supreme Court should have determined, in the exercise of its discretion, whether Benjamin, the appointee of the central church authorities in Moscow, or Metropolitan Theophilus, the archbishop of the North American metropolitan district, was the proper person to administer the temporalities of St. Nicholas Cathedral and whether he was the proper trustee "who may be relied upon to carry out more effectively and faithfully the purposes of this religious trust (*Carrier* v. *Carrier*, 226 N. Y. 114)." (*Kedrovsky* v. *Russian Catholic Church*, 249 N. Y. 75, 77-78, *supra*.) That was not done because it was thought that the cases of *Watson* v. *Jones* (13 Wall. [U. S.] 679, *supra*), and *Trustees of Presbytery of N. Y.* v. *Westminster Presbyt. Church* (222 N. Y. 305, *supra*), required a decision in favor of defendants and that the earlier case of *Kedrovsky* v. *Rojdesvensky* (242 N. Y. 547, *supra*), was determinative of some phases of the problem. Our views on this aspect of the controversy would require reversal and the ordering of a new trial so that the Supreme Court might exercise its discretion along the lines herein indicated. It is unnecessary, however, to discuss that further,

for there is another ground requiring reversal here and judgment in favor of the plaintiff and the North American metropolitan district which it represents.

We refer, of course, to the authoritative and unambiguous action finally taken by the New York State Legislature in 1945 and 1948 with respect to the controversy which has now occupied the attention of our courts for a quarter of a century.

If there were any doubt as to the proper determination of the case along common-law lines, it has been completely [fol. 515] eliminated by the Legislature. In April of 1945 (L. 1945, ch. 693), the Governor signed a bill adding a new article 5-C to the Religious Corporations Law consisting of four sections, two of which, sections 105 and 107, are presently material. In 1948 (L. 1948, ch. 711) important amendments were made to these sections which will be noted later. In the first section (§ 105), the Legislature defined the "Russian Church in America" (i.e., the North American church as we have referred to it above) and carefully traced its origin. The first paragraph of the section 105, as it reads today, is as follows: "The '*Russian Church in America*', as that term is used anywhere in this article, *refers to that group of churches, cathedrals,* chapels, congregations, societies, parishes, committees and other religious organizations of the Eastern Confession (Eastern Orthodox or Greek Catholic Church) *which were known as* (a) Russian American Mission of the Russian Orthodox Church from in or about 1793 to in or about 1870; (b) Diocese of Alaska and the Aleutian Islands of the Russian Orthodox Church from in or about 1870 to in or about 1904; (c) Diocese of North America and the Aleutian Islands (or Alaska) of the Russian Orthodox Church from in or about 1904 to in or about 1924; and (d) Russian Orthodox Greek Catholic Church of North America since in or about 1924; *and were subject* to the administrative jurisdiction of the Most Sacred Governing Synod *in Moscow* until in or about 1917, later the Patriarchate of Moscow, *but now constitute an administratively autonomous metropolitan district* created pursuant to resolutions adopted at a general convention (sobor) of said district held at Dertoit, Michigan, on or about or between April 2nd to 4th, 1924". (Emphasis supplied.)

The second paragraph of section 105, defines what is meant in the statute by the phrase "Russian Orthodox church." This is used as a word of art and is used generally to denote the particular local buildings or organizations of the Russian Orthodox faith as distinguished from the spiritual church. The statutory definition reads as follows: "A 'Russian Orthodox church', as that term is used anywhere in this article, is a church, cathedral, chapel, [fol. 516] congregation, society, parish, committee or other religious organization founded and established for the purpose and with the intent of adhering to, and being subject to the administrative jurisdiction of said mission [a above], diocese [b and c above], or autonomous metropolitan district [d above] hereinabove defined as the Russian Church in America." It is to be noted that the words "Russian Orthodox church" refer not only to those church buildings and religious organizations founded and established for the purpose and with the intent of adhering to, and being subject to the autonomous North American metropolitan district *since 1924*, but also to those properties and organizations adhering and subject in the past to the Russian Mission from 1793 to 1870, and the North American Dioceses from 1870 to 1904 and from 1904 to 1924.

These definitions, in turn, make the meaning and intent of section 107 clear. With them in mind, the following command of the Legislature in section 107 is abundantly plain:

"1. *Every Russian Orthodox church in this state, whether incorporated before or after the creation of said autonomous metropolitan district*, and whether incorporated or reincorporated pursuant to this article or *other article of the religious corporations law*, or any general or private law, *shall recognize and be and remain subject to the jurisdiction and authority* of the general convention (sobor), metropolitan archbishop or other primate or hierarch, the council of bishops, the metropolitan council and other governing bodies and authorities *of the Russian Church in America*, pursuant to the statutes for the government thereof adopted at a general convention (sobor) held in the city of New York on or about or between

October 5th and 8th, 1937, and any amendments thereto and any other statutes or rules, heretofore or hereafter adopted by a general convention (sobor) of the Russian Church in America *and shall in all other respects conform to, maintain and follow the faith,* doctrine, ritual, communion, discipline, canon law, traditions and *usages of the Eastern Confession* (Eastern Orthodox or Greek Catholic Church).

[fol. 517] "2. * * *

"3. *The trustees of every Russian Orthodox church shall have the custody and control of all temporalities and property,* real and personal, belonging to such church and of the revenues therefrom *and shall administer the same in accordance with the by-laws* of such church, the normal statutes for parishes of the *Russian Church in America* approved at a general convention (sobor) thereof held at Cleveland, Ohio, on or about or between November 20th, to 23d, 1934, and any amendments thereto and all other rules, statutes, regulations and usages of the Russian Church in America." (Emphasis supplied.) Little, if anything, is left for the courts to construe in the face of such a clear manifestation of intent. St. Nicholas Cathedral, the subject property herein, is indisputably a "Russian Orthodox church", as defined in the statute. It was built in 1903 and dedicated as a cathedral in 1905, in connection with the establishment of the Diocese of North America and the Aleutian Islands, which as we have seen, is listed in the first paragraph of section 105. It is a "cathedral * * * founded and established for the purpose and with the intent of adhering to and being subject to the administrative jurisdiction of said mission, *diocese,* or autonomous metropolitan district hereinabove defined as the Russian Church in America". (Emphasis supplied.) As such, it is within the purview of subdivision 1 of section 107 and must be subject to the jurisdiction and authority of the governing bodies of the North American church. Likewise, pursuant to subdivision 3 of section 107, the trustees of the St. Nicholas Cathedral corporation must administer the cathedral in accordance with the by-laws, the normal statutes for parishes of the Russian Church in America as therein defined.

Special Term attempted to construe the statute, as it

stood in 1945, in such a manner as to make it applicable *only* to those *new* parishes, founded and established *after 1924* for the express purpose of adhering to the Russian Church in America. Whether the court's construction was justified under the then wording of the statute is not before us, for after the decision at Special Term, and obviously [fol. 518] as a result of it, the Legislature amended the statute to read in its present form, above quoted. In order that there might not be any doubt that the 1945 legislation was intended to apply to a property, such as St. Nicholas Cathedral, the second paragraph of section 105, defining "Russian Orthodox Church", was amended so that there was included within its compass any cathedral "founded and established for the purpose and with the intent of adhering to, and being subject to the *administrative* jurisdiction of said *mission, diocese or autonomous metropolitan district hereinabove defined* as the Russian Church in America." (New matter italics.) Likewise, subdivision 1 of section 107, which provides that every such Russian Orthodox church in this State shall "recognize and be and remain subject to the jurisdiction and authority" of the Russian Church in America, was amended to provide that such Russian Orthodox churches were within its coverage "whether incorporated *before or after the creation* [1924] *of said autonomous metropolitan district.*" (New matter italics.) These significant amendments, enacted within a month after Special Term's decision, illustrate beyond cavil that the decision of that court did not correspond with the intent of the Legislature, which immediately interpreted and explained its prior enactment.

Nevertheless, the majority in the Appellate Division, while conceding that plaintiff was entitled to the benefit of the statute in its amended form, failed to properly appreciate and give meaning to what we consider to be the plain legislative intent. It said in part (p. 317): "In other words, it appears to us that it [§ 107] was intended to mean that any church *heretofore or hereafter* incorporated for the purpose of adhering to the American Church must be subordinate to the rules and the decisions of the authorities of the governing bodies of that church [the American church, the autonomous metropolitan district, created in 1924]." Such a view gives no meaning to the change

made by subdivision 1 of section 107, by the 1948 amendment. That amendment excised the three words "(heretofore or hereafter)" which we have italicized in the above quotation, and substituted the word: "before or after the [fol. 519] creation of said autonomous metropolitan district, [in 1924] * * *." The following quotation from subdivision 1 of section 107 shows in brackets the words eliminated by the 1948 amendment and indicates by italicizing the words substituted by that amendment: "Every Russian Orthodox Church in this State, whether [heretofore or hereafter] incorporated *before or after the creation of said autonomous metropolitan district,* * * * shall recognize and be and remain subject to the jurisdiction and authority of * * * the Russian Church in America, * * *." The Legislature quite clearly made the amendment after the decision at Special Term herein so as to remove the possibility of a construction such as that adopted by the Special Term and later the Appellate Division, that the statute was limited in its operation to churches incorporated after 1924. If, as the Appellate Division construed it, the statute were limited to churches "incorporated for the purpose of adhering to the American Church", that would mean that it could only apply to churches founded and established after 1924, since that was the year in which the autonomous metropolitan district, denominated by the Appellate Division, the American church, was created. Yet subdivision 1 of section 107 clearly states that it is to apply to Russian Orthodox churches "whether incorporated *before or after* the creation of said autonomous metropolitan district," i. e., before or after 1924. The only construction which gives meaning to all the language in sections 105 and 107 is that the statute was intended to apply to those Russian Orthodox churches founded and established before 1924 for the purpose of adhering and being subject to the North American Mission or North American Diocese, and to those Russian Orthodox churches founded and established after 1924 for the purpose of adhering and being subject to the autonomous metropolitan district. The majority in the Appellate Division further intimated that to read the statute literally would result in an interference in ecclesiastical concerns not within the competency of the Legislature. The latter suggestion is

the only one which requires discussion, for, as already indicated, the intent of the Legislature (as distinguished from its competency) is unmistakable.

[fol. 520] The primary purpose of the Religious Corporations Law is to provide for an orderly method for the administration of the property and temporalities dedicated to the use of religious groups and to preserve them from exploitation by those who might divert them from the true beneficiaries of the trust. Prior to 1875, when the Legislature provided for denominational control of the temporalities of religious corporations, the majority of the members of a religious corporation could change its denominational character and devote the church property to an entirely different religious faith than that for which it was originally dedicated. (*Robertson* v. *Bullions*, 11 N. Y. 243, 263-264; *Petty* v. *Tooker*, 21 N. Y. 267; *Gram* v. *Evangelical Lutheran Soc.*, 36 N. Y. 160). For the public good, the Legislature decreed that the trustees of religious corporations, irrespective of the wishes of the majority of the local congregation, must administer the temporalities in accordance with the discipline, rules and usages of the ecclesiastical body, if any, to which the corporation was subject. (Religious Corporations Law, § 5.) As a broad guide this rule undoubtedly has worked well, but it is by no means a constitutional doctrine not subject to change or modification by the same Legislature which announced it, in cases where literal enforcement would be unreasonable and opposed to the public interest. The Legislature, in the exercise of its extensive and acknowledged power to act for the common welfare, may find as a fact that a situation has arisen of such novelty and uniqueness that existing law is incapable of performing its avowed function—the preservation of religious temporalities for the use of their original and accustomed beneficiaries. If the Legislature find as a fact that, because of drastically changed circumstances, the accustomed beneficiaries of religious properties are thus threatened with their loss, and if there be a basis for such finding, we perceive no constitutional objection to a legislative attempt to trace and identify, as of today, the authentic group entitled to the administration of such properties.

That, as we see it, is all that the Legislature has done in the above-quoted provisions of article 5-C. The Legisla- [fol. 521] ture has made a determination that the "Russian Church in America" was the one which, to use our words in 249 New York at pages 77, 78, was the trustee which "may be relied upon to carry out more effectively and faithfully the purposes of this religious trust (*Carrier* v. *Carrier*, 226 N. Y. 114)" by reason of the changed situation of the patriarchate in Russia. No purpose would be served by repeating all the circumstances which forced the North American church to declare its temporary autonomy, and the process by which the Moscow Patriarchy has been subjugated by the Russian Government and used as its tool. All that has been detailed fully above. These facts must be deemed to have been found by and to have been within the actual knowledge of the Legislature when it decided to act in 1945 and 1948. Even assuming that we, as judges, are prevented from recognizing these facts, it cannot be successfully contended that the Legislature is required to labor under such unrealistic handicap.

The Legislature of the State of New York, like the Congress of the United States, in addition to the general knowledge of its members, has access to vast sources of information to assist in determining the need and scope of new statutory law. Every new piece of legislation is the result of certain factual premises, whether they be expressed or tacit. In gathering the material for these premises, and in evaluating conflicting data, the Legislature is not bound by any formal rules. It has the widest latitude of inquiry. It cannot, and does not, close its eyes to any legitimate avenue of knowledge.

The courts have always recognized that it is the province of the Legislature to make the underlying findings of fact which give meaning and substance to its ultimate directives. The courts have traditionally refused to consider the wisdom of technical validity of such findings of fact, if there be some reasonable basis upon which they may rest.

Thus, in passing upon matters of legislative intent and competence, the courts do not merely read the bare end product of the legislative labors. They read the statute in

the light of the state of facts which were found by the Legislature, and which prompted the enactment? Then, and [fol. 522] only then, can the courts intelligently approach their assigned tasks.

A recent pertinent example of such judicial recognition of the extent of the power of the legislative body to find the facts in a situation involving communist activity is found in *American Comunications Assn.* v. *Douds* (339 U. S. 382). There, the noncommunist oath provision in the National Labor Relations Act was upheld, not because any such oath requirement was generally within the power of Congress, but because the specific evil, *the existence of which Congress was assumed to have reasonably found as a fact,* was such that some infringement upon traditional liberties was justifiable. The case illustrates well that enactments which might seem unconstitutional on their face may yet be sustained if the factual background found by the legislative body warranted an extended exercise of its powers. The case is noteworthy, too, in that it rejects the fallacious contention that the legislative body cannot go behind a carefully constructed facade to ascertain the real motives, ends and techniques of communist activity. It recognizes, as we must recognize in the instant case, that problems created by the extension of Soviet communist activity in this country are *suigeneris,* and can only be dealt with intelligently on that basis.

As Justice JACKSON said in his opinion (p. 423, fn. 1): "Of course, it is not for any member of this Court to express or to act upon any opinion he may have as to the wisdom, effectiveness or need for this legislation. 'Our inquiries, where the legislative judgment is drawn in question, must be restricted to the issue *whether any state of facts either known or which could reasonably be assumed affords support for it.' United States* v. *Carolene Products Co.*, 304 U. S. 144, 154." (Emphasis supplied.) (See, also, *Powell* v. *Pennsylvania,* 127 U. S. 678, 685; *O'Gorman & Young* v. *Hartford Fire Ins. Co.*, 282 U. S. 251, 257-258; *Szold* v. *Outlet Embroidery Supply Co.*, 274 N. Y. 271, 278.)

The judicial technique of ascertaining the legislative finding of fact supporting a particular enactment is shown

in Justice JACKSON's opinion in the *Douds* case (*supra*, pp. 424-433). He wrote (p. 424):

[fol. 523] "From information before its several Committees and from facts of general knowledge, Congress could rationally conclude that, behind its political party facade, the Communist Party is a conspiratorial and revolutionary junta, organized to reach ends and to use methods which are incompatible with our constitutional system. A rough and compressed grouping of this data would permit Congress to draw these important conclusions as to its distinguishing characteristics." (Then follows a footnote containing a long list of books and articles.) * * *

"It rejects the entire religious and cultural heritage of Western civilization, as well as the American economic and political system. This Communist movement is a belated counter-revolution to the American Revolution, designed to undo the Declaration of Independence, the Constitution, and our Bill of Rights * * *" (p. 425).

The Legislature of the State of New York, like the Congress, must be deemed to have investigated the whole problem carefully before it acted. The Legislature knew that the central authorities of the Russian Orthodox Church in Russia had been suppressed after the 1917 revolution, and that the patriarchate was later resurrected by the Russian Government. The Legislature, like Congress, knew the character and method of operation of international communism and the Soviet attitude toward things religious. The Legislature was aware of the contemporary views of qualified observers who have visited Russia and who have had an opportunity to observe the present status of the patriarchate in the Soviet system.[17] The Legislature real-

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[17] Our former Ambassador to Russia wrote: "The new tolerance for the Orthodox Church can be seen, therefore, as severely limited and primarily designed to serve as an instrumentality of an expansive foreign policy." (Walter Bedell Smith, My Three Years in Moscow, p. 268.) See also, Anne O'Hare McCormick in the *New York Times*, April 8, 1950: "The church has again an official place in the Soviet Union, but as an agency of the state; on the

ized that the North American church, in order to be free of Soviet interference in its affairs, had declared its tem- [fol. 524] porary administrative autonomy in 1924, pursuant to the ukase of 1920, while retaining full *spiritual* communion with the patriarchate, and that there was a real danger that those properties and temporalities long enjoyed and used by the Russian Orthodox Church worshippers in this State would be taken from them by the representatives of the patriarchate. On the basis of these facts, and the facts stated (*supra*) and no doubt other facts we know not of, our Legislature concluded that the Moscow Patriarchate was no longer capable of functioning as a true religious body, but had become a tool of the Soviet Government primarily designed to implement its foreign policy. Whether we, as judges, would have reached the same conclusion is immaterial. It is sufficient that the Legislature reached it, after full consideration of all the facts.

It is clear, therefore, that the plaintiff corporation and the autonomous metropolitan district which it represents, must prevail in this action in accordance with the legislative finding and mandate and be reinvested with the possession and administration of the temporalities of St. Nicholas Cathedral.

The judgments below should be reversed, with costs in all courts, and judgment directed for the plaintiff.

Froessel, J. (concurring). As I view this controversy, we have the rather unusual situation of a foreign government, which all of us agree is grossly antireligious, assuming domination and control over the Russian Orthodox Church, leaving that church fettered, helpless and restrained of its freedom. Any other view, it seems to me, is to ignore stark reality. Under that domination, which is nothing less than plain duress, it seeks to reach out to the United States to assume control of church property within this State, title to which is held by plaintiff, a New York

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same terms the religious leaders being imprisoned and executed as 'traitors' in the countries under Soviet control would be tolerated. When Caesar is also God there can be no divided tribute."

State corporation, and which property has been dedicated to the use of members of a parish and of a diocese.

The evidence in the records before us, and as outlined in the prevailing opinion, buttressed by facts of historical knowledge of which we may take judicial notice (*Nankivel* v. *Omsk All Russian Government*, 237 N. Y. 150, 156), and [fol. 525] as found by the Legislature of this State (*East New York Sav. Bank* v. *Hahn*, 293 N. Y. 622), leads inescapably to the conclusion that plaintiff is entitled to judgment.

Judge Conway has sufficiently outlined in detail the history of the Russian Orthodox Church, so far as pertinent here. We are all in accord that the election of Patriarch Tikhon at the sobor of 1917-18, following the Kerensky revolution, had indisputable validity, and that Archbishop Evdokim was the duly appointed diocesan archbishop for North America in 1917, before he returned to Russia. It was he who held title to the property in suit for a short time (1916-17), and then voluntarily reconveyed it to plaintiff's corporate predecessor. After Kerensky was overthrown and the Bolsheviks came into power, the patriarchal chain of succession was broken. The prevailing opinion outlines briefly what happened to the Russian Orthodox Church in Russia. When Patriarch Tikhon, the last duly elected patriarch, was imprisoned, he issued his famous ukase to the Russian Orthodox Church abroad. In 1923, with the concurrence of the Sacred Synod, he designated Platon as ruling bishop of the North American church, who continued until his death in 1934, following his active participation in and approval of the American sobors, commencing in 1922, which invoked the ukase of 1920.

The first sobor of the Russian Orthodox Church held since Tikhon was elected Patriarch was the pseudo-sobor of 1923, at which no Patriarch was elected, and which is now conceded to have been uncanonical. The only other sobor held since was the one at Moscow in 1945, when the American delegates, two clergymen, were met by a Russian airplane, but deposited in Siberia instead of Moscow in the month of January, rendering it impossible for them to complete their journey by train until ten days after the sobor had adjourned, thus denying them representation though duly invited.

We do not have here any such situation as was presented in *Watson* v. *Jones* (13 Wall. [U. S.] 679) where the highest church body was concededly free. Here, the Russian Orthodox Church, as presently constituted and dominated, is [fol. 526] not free, its administrative agency is not the true body of the church, and is compelled to demand loyalty to the Soviet Government from all the priests of the Russian Church abroad.

By our decision, we are not intruding unlawfully into the internal affairs of a religious body, but rather refusing to sanction such intrusion by an atheistic foreign government, so far as it affects property within our jurisdiction. Plaintiff-appellant holds title to the property in suit, in trust, not for the Russian Orthodox Church, but rather for the use of the membership for whom it was dedicated, and, so long as it administers the property for the faithful of the church within the diocese, it is entitled to possession and control. (*Westminster Presbyt. Church* v. *Trustees of Presbytery of N. Y.*, 214 N. Y. 213.) As we there said (pp. 225, 226), where the ecclesiastical governing body's freedom of action was unquestioned, "* * * The error which, as it seems to me, pervades the disposition made of this case in the courts below, is the idea that the Presbytery could take away from the Westminster Presbyterian Church of West Twenty-third Street all authority and control of its trustees over its real property, and by hostile action appropriate that property to such uses as it saw fit without any legal proceeding to that end, and wholly by the exercise of the ecclesiastical jurisdiction of the Presbytery." How much more so does this reasoning apply to the instant situation.

I concur in Judge Conway's opinion.

Desmond, J. (dissenting). None of us, of course, deny that the present Russian Government is frankly and grossly antireligious and irreligious. But judicial recognition of that well-known fact is of no help in deciding this lawsuit. We are dissenting here because we strongly feel that this decision is an unlawful intrusion into the internal affairs of a religious body, contrary to first principles of American Government, violative of the First Amendment's guaranty of freedom of religions from such gov-

ernmental interference, and in conflict with the controlling decisional law as set forth in *Watson* v. *Jones* (13 Wall. [U. S.] 679) and *Westminster Presbyt. Church* v. *Trustees of Presbytery of N. Y.* (211 N. Y. 214). For the decision about to be made is just this: that the judical and legis- [fol. 527] lative branches of the Government of this State have the power (and that the New York State Legislature has exercised the power) to oust from the archdiocesan cathedral of the Russian Orthodox Church in New York City, a prelate (defendant Benjamin) who has been appointed archbishop of that archdiocese by the Patriarch of Moscow, supreme head of that church. No other decision reaching such a result can be found in the books.

In aid of clarity we set down these indisputable and uncontested propositions:

1. The Russian Orthodox Church is a "general" or centrally-organized church (see *Watson* v. *Jones, supra,* p. 722), under whose law and discipline the Patriarch of Moscow, as its supreme head, has the power of appointing archbishops.

2. Defendant Benjamin was appointed by the Patriarch as archbishop of the diocese of North America and the Aleutian Islands, and that appointment is now in effect.

3. The Russian Orthodox Cathedral in New York City, is the See church of the archdiocese, and, accordingly, defendant Benjamin, as the duly appointed archbishop is entitled to possess and occupy that cathedral as his See church.

4. Plaintiff-appellant, a New York corporation, holds title to the cathedral property but, under New York law, that title is in trust for the religious purposes of the Russian Orthodox Church, and for no other purpose (*Westminster Presbyt. Church* v. *Trustees of Presbytery of N. Y.*, 211 N. Y. 214, 223, *supra*).

5. Plaintiff, in seeking to exclude defendant Archbishop Benjamin from possession of the cathedral, is acting under the control of, and in the interest of, a dissident or schismatic group of Russian Orthodox Catholic individuals and parishes, which group, formed at Detroit in 1924, refuses to recognize the authority and primacy of the Patriarch of Moscow.

6. Under the law of New York (see Religious Corporations Law, § 5), religious denominations, such as the world-[fol. 528] wide Russian Orthodox Church, have denominational control over their constituent churches, parishes or branches, and the constituents cannot escape such control by secession (*Trustees of Presbytery of N. Y.* v. *Westminster Presbyt. Church*, 222 N. Y. 305, 315).

7. The appointment of Archbishop Benjamin, as an official act of the highest Russian Orthodox Church authority, was a decision on a denominational matter of internal church government, and as such is final and absolutely binding on the civil courts of this State (*Watson* v. *Jones*, 13 Wall. [U. S.] 679, 727, 729, *supra*).

The sum of those plain propositions is this: that Archbishop Benjamin's possession of the cathedral is not subject to control by any civil authority or by any judgment of a civil court, and that no civil court may decree to the independent or nonconformist group (which controls plaintiff corporation), possession of that cathedral, hostile to the authority and action of the mother church (*Watson* v. *Jones, supra*, at p. 734).

What bases, then, are announced for the direction by this court that a judgment issue which will remove defendant Benjamin from his cathedral? As we understand it, those asserted grounds are two: first, that the Moscow Patriarchate is not in fact functioning as the true central organization of the Russian church but is a mere agency or instrumentality of the Soviet regime; and, second, that article 5-C of the New York Religious Corporations Law has, by legislative fiat, ousted the patriarchal appointee, and turned the cathedral over to the schismatics. The first of those bases amounts to a new finding by this court, without evidentiary support in this record, and in the face of contrary testimony, and express contrary findings by both courts below. The second basis gives to article 5-C a construction not reasonably supported by its language, or by its history, or by any reasonable or discoverable legislative intent—a construction which, furthermore, makes the statute unconstitutional. We now take up these matters in turn.

The finding, or determination, now being made by the majority of this court as a basis for reversal is that

the presently ruling Patriarch of Moscow is not, and should [fol. 529] not, be treated as, the true central head of the church, but that he is a mere fellow traveler on the communist road, serving not God but the Soviet Caesar. Interestingly enough, plaintiff itself seems not to cast so cold an eye on the Patriarch, since the record abounds with protestations by the "American", or schismatic Orthodox Russians, of their filial loyalty and devotion to the Patriarch, whom they regard as a virtuous and venerable spiritual leader. Aside from that, and confining ourselves within the strict bounds of our own jurisdiction we, the Court of Appeals, have, of course, no power or right to adjudicate that the incumbent is no true Patriarch but a mere usurper or pretender. We dissenters refuse so to do, not from any mere naiveté as to Russia and communism, but as a necessary conclusion from the record in this lawsuit. At the very most, we have here the attempted determination of a fact, vigorously denied by witnesses, and found to the contrary by the courts which have jurisdiction to pass on facts.

It is suggested that common sense, or general knowledge, makes it appropriate for us to take judicial notice that Patriarch Alexy is not acting independently but is obeying commands of his communist masters. Perhaps he is, for all we know, but his motivation is no proper subject of judicial notice. Many years ago our predecessors warned us against taking judicial notice in such uncertain fields (see *Baxter* v. *McDonnell*, 155 N. Y. 83, 93). And, even if we could, somehow or other, get sure knowledge that the Patriarch's appointment of this archbishop was made for the most unholy reasons, or because of the meanest accommodation to brute power, we still could not, as a court, strike down the appointment or refuse to give it credit. The Patriarch, like all men, must account for his stewardship, but not to the New York courts.

The long and the short of it is that this is an ecclesiastical matter, to which, be their answer right or wrong, the ecclesiastic superiors have the final answer. "* * * and civil courts, if they should be so unwise as to attempt to supervise their judgments on matters which come within their jurisdiction, would only involve themselves in a sea of

uncertainty and doubt, which would do anything but improve either religion or good morals" (*Connitt* v. *Reformed* [fol. 530] *Protestant Dutch Church of New Prospect*, 54 N. Y. 551, 562). We are not talking about the powers of courts or of government to keep from our shores persons dangerous to our institutions, be they churchmen or laymen, or to deal with such persons when and if they violate our laws. No one has testified that Archbishop Benjamin is such a subversive, and, if he were, the New York courts would hardly be the place, or an action of ejectment the method, to arrange for his deportation from our shores. The United States Government has never withdrawn recognition of the Russian Orthodox Church and its Patriarch (see *Ponce* v. *Roman Catholic Church*, 210 U. S. 296, 318).

We turn now to the statute which seems to be appellant's chief reliance. Article 5-C of the Religious Corporations Law, consisting of four sections (§§ 105-108), was enacted in 1945 (L. 1945, ch. 693) and amended in 1948 (L. 1948, ch. 711). Its language follows the general pattern of several other articles in the same law. On its face there is no indication that it had any purpose other than that of any other special or general law incorporating a religious society or sect or church, that is, "to give an organization for public worship legal rights, and to impose on its legal obligations as a corporate body * * *" (*Van Buren* v. *Reformed Church of Ganzevoort*, 62 Barb. 495, 497; *Petty* v. *Tooker*, 21 N. Y. 267, 271). Incorporation of a church is the method by which the municipal law recognizes a church's present existence. Obviously, such a statute cannot be a device for transferring property from one faction to another, or for subjecting centrally organized churches to the control of seceding groups. Neither of those two general statements will be contradicted, and yet we are told that the passage by the New York Legislature, in 1945, of article 5-C and its amendment in 1948, had the precise and intended effect of freeing the whole Russian Orthodox religious community in America from its traditional submission to its supreme hierarchial head, of outlawing in New York so much of that community as remained submissive to the Patriarch, of putting the whose group and all its properties under the control of the new schismatic "Russian Church of America", and, specifically, of man-

dating the ouster of the patriarchically appointed arch-[fol. 531]bishop and the substitution of a rival claimant, not so appointed. We confidently assert that there is nothing in the statute itself to suggest such a legislative coup, that there is much to show that such was not the legislative purpose, and that the statute, if so intended and so construed, is plainly unconstitutional.

The first section (105) in article 5-C is headed "Definitions". It is not in form or meaning a preamble or legislative finding of fact. It defines two terms used elsewhere in the article: "Russian Church in America" and "Russian Orthodox Church". The long, one-sentence definition of the first of those terms says that, as used in the article, it means those churches, cathedrals, parishes, etc., which were known as the Russian American Mission of the Russian Orthodox Church from 1793 to 1870, then known as the Diocese of Alaska, etc., from 1870 to 1904, then as the Diocese of North America and the Aleutian Islands from 1904 to 1924, and which have been known as the Russian Orthodox Greek Church of North America since 1924, and which were subject to the administrative jurisdiction of the Most Sacred Governing Synod in Moscow until 1917, later the "Patriarchate of Moscow", but which, now constitute an administratively autonomous metropolitan district created pursuant to resolutions adopted at a general convention (sobor) of said district held at Detroit, Michigan, on or about or between April second to fourth, nineteen hundred twenty-four". A "Definition" of a term is a precise statement of its meaning. Nothing could be more precise than the statement (above summarized) which the Legislature thus gave us of what the Legislature meant by the use in article 5-C of the term "Russian Church in America". The definition describes, by reciting its history, the particular "group" of churches intended to be affected by the article. So read, the definition cannot possibly mean anything but this: that the "group" of churches or parishes thus recognized by the Legislature under the name "Russian Church in America", were those particular churches and parishes which were formerly part of the unified body called at successive times first the "Russian American Mission", then called the "Diocese of Alaska and the Aleutian Islands", then styled the "Diocese of

North America and the Aleutian Islands", and which have [fol. 532] been called the "Russian Orthodox Greek Catholic Church of North America" since 1924—in other words, the secessionists. To make that totally clear, the Legislature added to its "definition" a statement that it meant those churches, cathedrals or parishes which, though formerly subject to the Moscow Patriarch, had created themselves into an autonomous metropolitan district (or diocese) in April, 1924. On the trial, the witnesses agreed that not all the American parishes of the Russian Orthodox Church have gone over to the new "American" church. The definition described those who did so cross over. The second "definition" in section 105 (of "Russian Orthodox Church") says that term means a church, cathedral, etc., founded and established with the purpose and intent of adhering to the new metropolitan district.

The next section (106) or article 5-C sets forth the formalities for incorporation of a "Russian Orthodox Church", as defined in section 105. Section 107, as amended in 1948, prescribes the method of government, by the new "Russian Church in America" of "every Russian Orthodox Church in this state", whether incorporated before or after the creation of the new "autonomous metropolitan district". Appellate seizes upon the words "every Russian Orthodox Church in this state" as meaning, literally, every Russian Orthodox parish, church or cathedral, whether or not it has seceded, and whether or not it desires to retain its traditional ties with the Patriarch. Of course, the words must be limited as defined in section 105, which says precisely what they are to mean, when "used anywhere in this article".

Section 108, headed "reincorporation of existing corporations" authorizes the reincorporation "under the provisions of this article", of any "heretofore incorporated Russian Orthodox Church". Such a provision would be useless and meaningless if the Legislature had, by the previous sections of the article, put every Russian Orthodox church and parish, automatically, into the new, dissident, "Russian Church in America". Indeed, if so strange and ruthless a plan had been intended by the Legislature, section 105 itself ("Definitions") would have been mean-

[fol. 533] ingless and unnecessary since, with all included, there would be no need for any definition or limitation.

Article 5-C, we think, is so plain and clear as not to need or permit any construction beyond the patent meaning of its simple words (*Matter of Rathscheck*, 300 N. Y. 346, 350). But if construction were permissible, every known canon of construction would lead to the same result: that the Legislature could not have intended this as a statute of outlawry, ouster, or disestablishment. Words in a statute are to receive their natural and obvious meaning; the general purpose and spirit of the law is to be kept in mind; objectionable consequences, in justice and unreasonableness are to be avoided; acts will not be so construed as to accuse the Legislature of a purpose to do harm (see McKinney's Cons. Laws of N. Y. Book 1, Statutes [1942 ed.], §§ 94, 96, 141, 143, 146, 148, 151, and cases cited for these propositions). A bad result suggests a wrong construction (*People ex rel. Beaman* v. *Feitner*, 168 N. Y. 360, 366). We find another aid to construction in the very practical idea that the busy New York Legislature which enacted over 1,200 laws in 1945, and which had no committee reports or debates as to article 5-C, was entitled to believe that this law meant what it said, without hidden purposes.

And one of the most urgent of all the canons of construction is this one: that a statute must be construed, when possible, "in manner which would remove doubt of its constitutionality, and possible danger that it might be used to restrain or burden freedom of worship or freedom of speech and press" (*People* v. *Barber*, 289 N. Y. 378, 385). Put another way, the rule is that the construction, if at all possible, must be such as not only to avoid unconstitutionality but to avoid grave doubts thereof (*Matter of Cooper*, 22 N. Y. 67, 87, 88; *Kovacs* v. *Cooper*, 336 U. S. 77, 85; *Tauza* v. *Susquehanna Coal Co.*, 220 N. Y. 259, 267; *People* v. *Realmato*, 294 N. Y. 45, 50; *United States* v. *Jim Fuey Moy*, 241 U. S. 394, 401). How can there be any dispute but that this article 5-C, if read so as to take this archbishopric from the control of the central church and give it to appellant's group, is unconstitutional? *Watson* v. *Jones* (*supra*), does not use the precise word "unconstitu-
[fol. 534] tional" but the opinion, contrasting American with old world systems (see p. 728 *et seq.* of 13 Wall [U. S.]),

says that "in this country the full and free right to entertain any religious belief, to practice any religious principle" finds expression in the American rule of law that the determinations of the tribunals and judicatories of a centrally-organized church are absolutely binding on the civil power. The modern Supreme Court in *Everson* v. *Board of Educa.* (330 U. S. 1, 13), has cited *Watson* v. *Jones* (*supra*), as authority for the proposition that the First Amendment provides "protection against governmental intrusion on religious liberty" through statutes. It is no answer to this charge of unconstitutionality that there is here in dispute a "property right" only as to the use of a building. "* * * when rights of property are dependent upon the questions of doctrine, discipline or church government, the civil court will treat the determination made by the highest tribunal within the church as controlling" (*Baxter* v. *McDonnell*, supra, 155 N. Y., 83, 101, citing *Watson* v. *Jones, supra;* and *Connitt* v. *Reformed Protestant Dutch Church of New Prospect, supra;* see *Gonzales* v. *Archbishop of Manila*, 280 U. S. 1, 16).

We pause to remark on the notable similarity between the present case and *Watson* v. *Jones* (*supra*). A controversy over slavery split the Presbyterian Church in Kentucky in the 1860s; dissension over communistic ideologies and Soviet controls played their part in the internecine warfare which broke out among the American members of the Russian Orthodox Church. A faction withdrew from the central control in the Presbyterian Church; plaintiff's faction here divorced themselves from their supreme hierarch. In *Watson* v. *Jones*, the Supreme Court, holding the Presbyterian controversy to be "a case of division or schism" (p. 717), as is surely true of our case, made the classic statement of law which runs from page 722 to the end of the long opinion. The holding as between the dissenters and the central organization was summarized thus: "They [the schismatics] now deny its authority, denounce its action, and refuse to abide by its judgments. They have first erected themselves into a new organization, and have since joined themselves to another totally [fol. 535] different, if not hostile, to the one to which they belonged when the difficulty first began. Under any of the decisions which we have examined, the appellants, in their

present position, have no right to the property, or the use of it, which is the subject of this suit" (p. 734).

Going back to the statute (art. 5-C) and its supposed effect here, we have, fortunately the strongest kind of proof from the Religious Corporations Law itself that the Legislature never intended for article 5-C the meaning and result now ascribed to it. In 1943 (ch. 145 of that year) the Legislature, two years before it set up article 5-C, had enacted a new article XV of the Religious Corporations Law and had, concurrently, amended subdivision 3 of section 15 of the Religious Corporations Law. That 1943 legislation described and recognized a "Federation" of the "Four Primary Orthodox Greek Catholic Jurisdictions in America", being the churches, congregations, etc., recognized by the "apostolic historic Orthodox Patriarchates of Constantinople, Antioch, Moscow and Serbia (Jugoslavia)". Among other things, that 1943 law described the processes whereby new congregations adhering to the four historic patriarchates could be newly incorporated or reincorporated as member churches of the federation. The significance for us is this: as late as 1943, the Legislature was thus legislating as to those churches which were under the government of the Moscow Patriarch. The Governor of New York, after signing the bill, made it clear that he so understood its import. In a speech at Buffalo (see Public Papers of the Governor, 1943, p. 550) Governor Dewey said: "For more than one hundred and eighty years members of the Greek Church have been on what is now American soil. We find in the records that as long ago as 1763 a native of the Aleutian Islands was converted by a devout and hardy missionary from Russia. Nineteen years later the Holy Synod sent a mission of eight monks to Alaska and in 1794 they established missionary headquarters on the Kodiak Island. Three years later the hierarchy of the Greek Church consecrated a Bishop of Alaska, but he perished at sea before he could ever reach his diocese. The living successor of the reverend prelates who succeeded [fol. 536] him is The Most Reverend Metropolitan Benjamin of New York. It is an interesting historic fact, particularly in these days, that his full title is Metropolitan of the Archdiocese of the Aleutian Islands and North America."

The Most Reverend Metropolitan Benjamin whom the Governor thus saluted as the successor to the historic line of Orthodox prelates in America was our defendant Benjamin.

Thus we see that in 1943, by article XV and the amendment to section 15, the Legislature dealt with those Orthodox churches which remained loyal to the Patriarch and in 1945 and 1948, through article 5-C, gave its attention and recognition to the new, nonconformist "American Church". There is no slightest sign that the Legislature intended the later statutes to repeal the earlier. We should not strain to discover a repeal by implication but must read these statutes as harmonious parts of a whole and assume that the Legislature in 1945 knew what it had done in 1943 (*Matter of Cooper, supra*, 22 N. Y. 67, 88; *Chase* v. *Lord*, 77 N. Y. 1, 18; *Matter of Tiffany*, 179 N. Y. 455, 457; *Matter of Timmis*, 200 N. Y. 177, 181; *Betz* v. *Horr*, 276 N. Y. 83, 88; *Morris Plan Ind. Bank of N. Y.* v. *Gunning*, 295 N. Y. 324, 331). "The intent and purpose of the legislative commands must be found from the statutes relating to the same general subject-matter taken as a whole" (*Betz* v. *Horr, supra*, p. 88). "If by any fair construction, whether strict or liberal, a reasonable field of operation can be found for both acts, that construction should be adopted. In other words, if the old and the new law, by any reasonable interpretation, can stand together, there is no repeal by implication" (*Matter of Tiffany, supra*, p. 457). The Legislature in 1943 dealt with the patriarchal church, in 1945 with the American church, and there is no repugnance, inconsistency or over-lapping of the two sets of statutes.

A final comment:

In the long run, communist repression and abuse of religion will make religion stronger, for "the blood of the martyrs is the seed of the Church". And so with government interferences with churches in our country. But with us the loser will be a traditional principle of American [fols. 537-538] Government: that the inner affairs of religious bodies are no concern of the state.

The judgments should be affirmed, with costs.

LEWIS, DYE and FROESSEL, JJ., concur in opinion by CONWAY, J.; LEWIS, CONWAY and DYE, JJ., concur in separate

opinion by FROESSEL, J.; DESMOND, J., dissents in opinion in which LOUGHRAN, Ch. J., and FULD, J., concur.

Judgment reversed, etc.

[fol. 539] IN COURT OF APPEALS OF NEW YORK

SAINT NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH OF NORTH AMERICA, *Appellant*,

vs.

JOHN KEDROFF & ANO., & C., *Respondents*

REMITTITUR—December 1, 1950

Be it remembered, That on the 25th day of April in the year of our Lord one thousand nine hundred and fifty Saint Nicholas Cathedral of the Russian Orthodox Church of North America the appellant in this cause, came here unto the Court of Appeals, by Ralph Montgomery Arkush, its attorney, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department. And John Kedroff & ano., & c., the respondents in said cause, afterwards appeared in said Court of Appeals by Philip Adler, their attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

[fol. 540] Whereupon, The said Court of Appeals having heard this cause argued by Mr. Ralph Montgomery Arkush, of counsel for the appellant, and by Mr. Philip Adler, of counsel for the respondents, and after due deliberation thereon did order and adjudge that the Judgments herein be and the same hereby are reversed, with costs in all courts, and judgment directed for the plaintiff.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

[fol. 541] Wherefore, it is considered that the said judgments be reversed, with costs & c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals

aforesaid, by it given in the premises, are by said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in said Supreme Court, before the Justices thereof, & c.

Raymon J. Cannon, Clerk of the Court of Appeals of the State of New York.

Clerk's Certificate to foregoing papers omitted in printing.

[fols. 542-548] In Court of Appeals of New York

[Title Omitted].

Order Denying Motion for Reargument and Amending Remittitur—March 9, 1951

A motion for a reargument of the above cause, or, in the alternative, to amend the remittitur, having heretofore been made upon the part of the respondents, papers having been submitted thereon and due deliberation thereupon had, it is

Ordered that the motion for reargument be and the same hereby is denied. The remittitur is amended by adding thereto the following:

Upon this appeal there was presented and necessarily passed upon a question under the Constitution of the United States, viz: whether Article 5-C of the Religious Corporations Law, as construed by this Court, violated any rights of the defendants guaranteed by the First and Fourteenth Amendments to the Constitution of the United States. This Court held that the aforesaid statute did not violate any of the rights of the defendants guaranteed by those Amendments to the Constitution of the United States.

And, the Supreme Court, New York County, is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy.

Gearon Kimball, Deputy Clerk.

[fol. 549] In Court of Appeals of New York

[Title Omitted]

Order Allowing Appeal—April 11, 1951

It appearing to this Court that John Kedroff and Benjamin Fedchenkoff, as Archbishop of the Archdiocese of North America and the Aleutian Islands of the Russian Orthodox Greek Catholic Church, have filed their petition for appeal to the United States Supreme Court and have filed herewith their assignment of errors as well as their statement as to the jurisdiction of said Court as required by rule 12 thereof, disclosing that said Court has jurisdiction upon appeal to review the judgment of the Court of Appeals of the State of New York rendered on November 30th, 1950, in favor of appellee and against appellants, and the judgment of the Supreme Court of the State of New York, entered on April 4, 1951, pursuant to the remittitur of the Court of Appeals, it is

Ordered that the appeal as prayed for be and the same hereby is allowed to the Supreme Court of the United States from said judgment of the Court of Appeals of the State of New York rendered on November 30th, 1950, in favor of appellee and against appellants and from the judgment of the Supreme Court of the State of New York, entered on April 4th, 1951, pursuant to the remittitur of the Court of Appeals, and that said appellants give a bond with good and sufficient surety in the sum of Five Hundred ($500.00) Dollars that they, as appellants, shall prosecute [fol. 550] their appeal to effect and also pay damages and costs if they fail to make their appeal good.

It is further ordered that citation shall be issued in accordance with law.

Dated: April 11th, 1951.

John T. Loughran, Chief Judge of the Court of Appeals.

[fol. 551] IN COURT OF APPEALS OF NEW YORK

[TITLE OMITTED]

PETITION FOR ALLOWANCE OF APPEAL BY COURT OF APPEALS, STATE OF NEW YORK

To the Honorable John T. Loughran, Chief Judge of the Court of Appeals:

Appellants, John Kedroff and Benjamin Fedchenkoff, as Archbishop of the Archdiocese of North America and the Aleutian Islands of the Russian Orthodox Greek Catholic Church, feeling aggrieved by the judgment of the Court of Appeals of the State of New York rendered on November 30th, 1950, directing judgment in favor of appellee, and reversing the judgment of the Appellate Division of the Supreme Court of the State of New York, First Department, in favor of appellants and the judgment of the Supreme Court of the State of New York entered on April 4th, 1951, pursuant to the remittitur of said Court of Appeals, for the reasons set forth in their assignments of errors included herein, pursuant to Rule 36, Paragraph 1 of the Rules of the Supreme Court of the United States, respectfully pray that an appeal be allowed to the Supreme Court of the United States from the said judgment of the Court of Appeals, and said judgment of the Supreme Court of the State of New York, pursuant to the provisions of Section 1257 of Title 28 of the United States Code.

Pursuant to Rule 12 of the United States Supreme Court, appellants present with this petition a separate [fol. 552] typewritten statement particularly discussing the bases on which they claim the Supreme Court of the United States has jurisdiction to review the judgments in question.

Statement

This case is one in which is drawn into question the validity of Article 5-C of the Religious Corporations Law of the State of New York, L. 1945, c. 693; amended L. 1948, c. 711, on the ground that, as construed and applied by the Court of Appeals of New York, said statute is repugnant to the First and Fourteenth Amendments to the Constitution

of the United States, the decision of said Court of Appeals being in favor of the validity of such statute as so construed.

Therefore, in accordance with Rule 36, Paragraph 1 of the Rules of the Supreme Court of the United States and Section 1257, Title 28 of the United States Code, appellants respectfully show that the case is one in which a review may be had in the Supreme Court of the United States on appeal as a matter of right, and accordingly pray that such appeal be allowed and that a transcript of the record on appeal be certified and sent to the Supreme Court of the United States.

Assignment of Errors

Appellants in the above case, together with the foregoing petition for allowance of the appeal to the Supreme Court of the United States, file herewith the following assignments of errors which they alleged were committed by the Court of Appeals of New York in its judgment of November 30th, 1950 reversing the judgment in favor of appellants aforementioned:

1. The Court of Appeals erred in holding that Article 5-C of the Religious Corporations Law of the State of New York (Laws of 1945, c. 693; amended L. 1948, c. 711), as construed and applied by said Court to the appellants, is [fol. 553] constitutional, and in refusing to hold that said statute, so construed and applied, is unconstitutional because:

(a) it abridges the freedom of religion and the liberty guaranteed to them by the First and Fourteenth Amendments to the Constitution of the United States; and

(b) it takes their property rights without due process of law, in violation of said Fourteenth Amendment.

2. The Court of Appeals erred in reversing the judgment rendered in favor of the appellants by the Supreme Court of the State of New York and the judgment of the affirmance rendered by the Appellate Division of said Supreme Court for the First Department, and in directing a judgment against them and in favor of the appellee, because such judgment of reversal

(a) abridges the freedom of religion and the liberty guaranteed to them by the First and Fourteenth Amendments to the Constitution of the United States; and

(b) takes their property right without due process of law, in violation of said Fourteenth Amendment.

3. The Court of Appeals erred in holding that the Supreme Court of the State of New York has any discretion to award possession of Saint Nicholas Cathedral, the canonical seat of the Archdiocese of North America and the Aleutian Islands of the Russian Orthodox Greek Catholic Church, to somebody other than the duly appointed and accredited Archbishop of said Archdiocese who is entitled to such possession under the canon law of said Church, [fol. 554] to wit, appellant Benjamin. Such holding necessarily involves interference in the internal affairs of said Church, and abridges the freedom of religion and the liberty guaranteed to the appellants by said First and Fourteenth Amendments.

4. The Court of Appeals erred in holding that the defense of the appellant Benjamin Fedchenkoff, that this action was barred by the statute of limitations of the State of New York, had been abandoned, waived, or otherwise effectively eliminated, and in failing and refusing to consider and rule on said defense on its merits. Such holdings were without any foundation in fact, were arbitrary and capricious, and denied said appellant the due process of law and the equal protection of the laws guaranteed to him by said Fourteenth Amendment.

5. The Court of Appeals erred and deprived appellants of due process of law guaranteed by said Fourteenth Amendment:

(a) In finding as matters of fact by judicial notice that "the Moscow Patriarchy has been subjugated by the Russian Government and used as its Tool" and "is not the true body of the church", and that "the Russian Orthodox Church, as presently constituted and dominated, is not free", and making said findings the "determinative" ground of its decision. Such findings were arbitrarily made, were contrary to the evidence, contrary to the findings of fact made by the Appellate Division, and were beyond the jurisdictional competence of the Court of Appeals.

(b) In finding that Saint Nicholas Cathedral is held in trust "for the benefit of the faithful for whose use it [fol. 555] was originally dedicated" i.e., "all the members of the diocese", and "not for the Russian Orthodox Church", and in making said finding a ground of its decision. Such finding was arbitrarily made and was contrary to the undisputed evidence that said Cathedral was consecrated to, and under the canon law of the Russian Orthodox Church, is held in trust for, possession and use of the duly appointed and accredited Archbishop of said Archdiocese as a residence, place of worship and administrative headquarters, was contrary to the findings of fact made by said Appellate Division, and was beyond the jurisdictional competence of the Court of Appeals.

(c) In making findings of fact based on evidence introduced in a different case between different parties (*Kedrovsky* v. *Rojdesvensky*, 214 App. Div. 483, affirmed 242 N. Y. 547), and in making said findings, a ground of its decision. Such findindgs were contrary to the findings of fact made in that case by said Appellate Division and were beyond the jurisdictional competence of the Court of Appeals.

(d) In applying said article 5-C of the Religious Corporations Law of the State of New York retroactively to the present action which was already pending when said statute became law.

Wherefore, appellants pray that an appeal be allowed to the Supreme Court of the United States from said judgment of the Court of Appeals of November 30th, 1950, and [fol. 556] the judgment of the Supreme Court of the State of New York, entered on April 4th, 1951, pursuant to the remittitur of said Court of Appeals and that said judgments be reversed.

Dated: April 10th, 1951.

Respectfully submitted, Philip Adler, Attorney for Defendants-Appellants.

Read April 11, 1951, John T. Loughran, Chief Judge, New York Court of Appeals.

[fols. 557-571] Citation in usual form omitted in printing.

[fols. 572-579] SUPREME COURT OF THE UNITED STATES

ST. NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH IN NORTH AMERICA, *Appellee,*

against

JOHN KEDROFF and BENJAMIN FEDCHENKOFF, as Archbishop of the Archdiocese of North America and the Aleutian Islands of the Russian Orthodox Greek Catholic Church, *Appellants.*

STATEMENT OF POINTS TO BE RELIED UPON—Filed May 18, 1951

A. Appellants adopt, for their statement of points upon which they intend to rely on their appeal to this Court, the points contained in their assignment of errors heretofore filed herein.

B. Appellants designate the entire record, including the case on appeal heretofore printed, as filed in the above entitled case, for printing by the Clerk of this Court, except that the following may be omitted:

[fol. 580] SUPREME COURT OF THE UNITED STATES

No. 717, October Term, 1950

[TITLE OMITTED]

ORDER NOTING PROBABLE JURISDICTION—June 4, 1951

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.